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No. .....

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In The

# Supreme Court of the United States

October Term, 1984

FRED TESCH, et al.,
*Petitioners,*

vs.

ROBERT E. McCURRY, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether Respondents satisfied the actual case or controversy prerequisite for declaratory and injunctive relief where the state court order in question was suspended nearly two months before the filing of this action and where there was no claim of continuing present adverse effects?

2. Whether law enforcement officers who carry out the facially valid orders of a judge are absolutely immune from claims for damages, declaratory and injunctive relief arising from such actions?

3. Whether prosecutors are absolutely immune from the claims for damages, declaratory and injunctive relief in this action?

4. Whether a political subdivision may be subject to damages, declaratory or injunctive relief where the complaint alleges no action, custom, or policy by the political subdivision which deprived plaintiffs of their rights under the Constitution and laws?

5. Whether declaratory or injunctive relief may be entered by a federal court which would interfere with a prior, continuing state court contempt proceeding in which the interest of the defendants are closely intertwined with the interests of the plaintiffs in the federal proceeding?

6. Whether the opinion of the Court of Appeals for the Eighth Circuit directing entry of a declaratory judgment constitutes so great a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

## LIST OF PARTIES

FRED TESCH, in his official capacity as Sheriff of Cass County, Nebraska, and individually; LARRY SHELBOURN, in his official capacity as Chief Deputy Sheriff of Cass County, Nebraska, and individually; RAYMOND SYSLO, in his official capacity as a Captain of the Nebraska State Patrol, and individually; RONALD D. MORAVEC, in his official capacity as Cass County Attorney; PAUL L. DOUGLAS, in his official capacity as Attorney General of Nebraska, and the COUNTY OF CASS, NEBRASKA,

*Petitioners,*

vs.

ROBERT E. McCURRY, H. EDWARD ROWE, RICHARD C. MOORE, GREG DIXON, DENNIS BROWN, ROBERT A. COLLINS, RICHARD L. WEIGHTMAN, DENNIS A. CORLE, DANIEL EYLAR, DAVID A. EYLAR, CARROLL L. TORBERSON, CARLTON CURTIS, MARK A. BILBREY, OLIN R. ADAMS, BILLY ARNOLD, KENYON PAUL HANEY, MICHAEL S. BACKHAUS, BILL G. BREWER, PRICE BROWN, RICHARD A. CLOYED, JOHN W. CURTIS, CHARLES DAY, JESSE DAY, STEPHEN L. FERGUSON, J. MICHAEL GIBBS, EARL HARGIS, ALLEN R. KINCAID, FRANCIS J. KUHLMAN, LARRY L. LAUTARET, CARL W. LAURENT, DAVID H. LYDICK, RICHARD MAY, GEORGE F. MONDAY, GERALD L. POPE, ERIC L. RIST, PHILIP A. SCHMIDT, TUNIS SCHURMAN, CLIFFORD SIMS, DENNIS A. SIMS, HARRY R. SMITH, DALE L. SPEAR, EDWARD L. THIBODEAUX, RONALD L. TOTTINGHAM, GARY J. UIT DE FLESCH. LESLIE A. WARREN, JERRY WEST, GARY H. WILLIAMS, SAMUEL L. WOODRUFF, DENNIS E. FOUNTAIN, CARL SPENCER, JR., HARVEY SCHULZ, GARY LEE PETERSON, RALPH H. LILES, MICHAEL McKINNEY, ALFRED J. RILEY, DALE K. DYKEMA, BRANDON DYKEMA, HOWARD QUINLAN, ROBERT MUNCASTER, GARY LEE ASHFORD, H. LYNN BOWEN, RICHARD GREGORY, MICHAEL WOLFRAM, HERBERT LAWSON, PHILLIP LILES, JEAN PERRY, and DAVID FRANK WALKER,

*Respondents.*

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this matter on June 29, 1984, as amended on August 24, 1984.

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## OPINIONS BELOW

The Order of the District Court of Cass County, Nebraska (hereinafter, the "state district court") was entered on October 14, 1982. (App. A, *infra,* 1a-5a). Said Order was withdrawn by the state district court's Order entered October 20, 1982 (App. B, *infra,* 6a-7a).

The Memorandum on Motions to Dismiss (App. C, *infra,* 8a-21a), the Order of Dismissal (App. D, *infra,* 22a), and the Order amending the Memorandum (App. E, *infra,* 23a) of the United States District Court for the District of Nebraska (hereinafter, the "District Court") are not yet reported.

The Opinion of the Court of Appeals of June 29, 1984 (App. F, *infra,* 24a-40a), is reported at 738 F.2d 271. The Order of the Court of Appeals (App. G, *infra,* 41a) amending its slip opinion of June 29, 1984, and the Order (App. H, *infra,* 42a) denying rehearing by the panel or en banc are not yet reported.

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## JURISDICTION

The opinion of the Court of Appeals was filed on June 29, 1984. It was amended on August 24, 1984. The Order denying rehearing en banc was also entered on August 24, 1984. (App. H, *infra,* 42a). The Order of Associate Justice Blackmun staying issuance of the mandate of the Court of Appeals was entered September 21, 1984. Because of the printer's workload and the Thanksgiving Holidays, Associate Justice Blackmun issued an Order granting Petitioners' request to extend the time in which to file this Petition to December 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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## CONSTITUTIONS AND STATUTE

The relevant portions of the Constitution, Article III and the First Amendment, and 42 U.S.C. § 1983 are set forth at App. I, *infra,* 43a-44a.

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## STATEMENT OF THE CASE

1. Respondents allegedly were occupants of the Faith Baptist Church in Louisville, Nebraska, in the early morning hours on Monday, October 18, 1982, when Petitioner Tesch, Sheriff of Cass County, arrived to enforce an order entered by the District Court of Cass County, Nebraska. The order, issued four days earlier, specifically required that the entire church building be padlocked at

that time. (App. A, *infra,* 4a). Respondents declined to voluntarily leave the building at the law enforcement officers' request and were peacefully removed. (Id.). There were no arrests, and there was no claim of excessive force or violence associated with Respondents' removal from the building (App. C, *infra,* 11a-12a).

2. The injunctive order directing padlocking of the church building on October 14, 1982, was part of an action commenced by the State of Nebraska to enjoin the operation of Faith Christian School (the "private school") in the church building pending compliance with state laws and regulations governing such activities (App. A, *infra,* 2a-3a). The initial injunction was affirmed by the Supreme Court of Nebraska. *Nebraska v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981). This Court dismissed defendants' appeal from the Nebraska Supreme Court for want of a substantial federal question. *Faith Baptist Church v. Nebraska,* 454 U.S. 803 (1981).

After this Court refused to stay the mandate of the Nebraska Supreme Court on March 11, 1981, the state district court enjoined the church, the private school, and several individuals from further operation of a school until they complied with Nebraska law (App. C, *infra,* 15a). On April 24, 1981, the state district court found the church and its pastor in contempt, but allowed the private school to operate for an additional two weeks to complete the school year on condition that defendants would thereafter either cease operation of the private school or comply with Nebraska law (Designated Record ["D.R."] 40-42).

On September 11, 1981, the state district court determined that the private school had remained in opera-

tion without complying with Nebraska law. To enforce its order, the court directed the Sheriff of Cass County to secure the building with padlocks on all entrances, the building to be opened on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services (App. C, *infra,* 16a). This order was appealed, but the appeal was subsequently dismissed due to appellants' failure to file briefs. *Nebraska v. Faith Baptist Church,* No. 81-726 (Neb. Sup. Ct. 1982); *See, Sileven v. Tesch,* 212 Neb. 880, 882, 326 N.W.2d 850, 852 (1982). In the interim the state district court directed the Sheriff to withdraw the locks when it appeared after two weeks that the private school was no longer operating in the building (App. A, *infra,* 1a-2a).

On February 12, 1982, the state district court found that Faith Baptist Pastor Sileven was continuing to operate the private school in violation of state law and in violation of the injunction. Pastor Sileven was ordered confined in the county jail for four months based on his willful contempt. Thirteen days later Pastor Sileven was released from jail by the state district court based on the closing of the private school and Pastor Sileven's affidavit disclaiming any further association with the private school (D.R. 45-48, App. A, *infra,* 3a). On May 5, 1982, the state district court found that the private school had been reopened in violation of state law and that Pastor Sileven had been reelected the private school's administrator. Pastor Sileven was ordered to return to the county jail on September 1, 1982, to serve the remaining portion of the four month confinement for contempt of court. (D.R. 50-51, App. A, *infra,* 3a).

On October 14, 1982, the state district court found that the private school had reopened on September 15, 1982, and remained in operation in violation of the injunction and of state law. The court reinstated its order of September 11, 1981, and directed the Sheriff to secure the building, to open it on Wednesday evenings and weekends, and to prevent the operation of a school for the teaching of non-religious subjects from Monday through Friday of each week. The first enforcement was directed to occur four days later on Monday, October 18, 1982. (App. A, *infra,* 1a-4a).

Six days later, on Wednesday, October 20, 1982, the state district court found that representatives of the Faith Baptist Church were desirous of using the building that afternoon for a prayer meeting and also noted that large numbers of non-residents were present for the purpose of resisting the injunction, making the potential for violence great. Accordingly, t e state district court withdrew its enforcement order, and the Sheriff removed the padlocks immediately. (App. B, *infra,* 6a-7a). On October 22, 1982, the state district court found that the private school had been closed and ordered Pastor Sileven released pending further orders of the court (D.R. 69-70).

3. Respondents filed the present action in the U.S. District Court for the District of Nebraska on December 13, 1982. The amended complaint sought damages in the amount of $1,000,000 for each Respondent plus declaratory and injunctive relief based on the peaceful removal of Respondents from the Faith Baptist Church and the padlocking of the building by the Sheriff and other officers on October 18, 1982. (D.R. 14-25).

The District Court noted there was no claim that Attorney General Douglas or prosecutor Moravec ever acted outside their official capacities, and dismissed all damage claims against them because of their absolute immunity. *Imbler v. Pachtman,* 424 U.S. 409 (1976); *White v. Bloom,* 621 F.2d 276 (8th Cir. 1980). Law enforcement officer defendants Tesch, Syslo and Shelbourn, were also held to be absolutely immune from the damage claims because their actions were non-discretionary and purely ministerial in that they did nothing other than perform court orders. *Hevelone v. Thomas,* 423 F.Supp. 7 (D Neb. 1976); *Rhodes v. Houston,* 202 F.Supp. 624 (D Neb. 1962), *aff'd* 309 F.2d 959 (8th Cir. 1962), *cert. den.* 372 U.S. 909 (1963), *cert. den.* 383 U.S. 971 (1966). The Sheriff could not padlock the building without removing all the people in the building, and he lacked authority under the state court order to leave the building unlocked even if it was being used for church services. Plaintiffs were neither arrested nor were they removed from the church because they were attending a church service; they were removed to enforce an injunction against the operation of a school. (App. C, *infra,* 9a-14a).

The District Court refused to hold the state court orders unconstitutional on the alleged grounds that they authorized the interruption of a church service. It noted that the proper route of appeal was to the Supreme Court of Nebraska, and a federal district court cannot hear an appeal from a state court. *District of Columbia Court of Appeals v. Feldman,* — U.S. —, 75 LEd.2d 206, 225, 103 S.Ct. 1303, 1317 (1983). It also noted that an injunction issued by a state court with proper jurisdiction must be obeyed unless it is transparently invalid or based on

frivolous pretenses. *Walker v. City of Birmingham,* 388 U.S. 307, 315 (1967). The injunction here was issued by a court with jurisdiction, and it was not transparently invalid. The Sheriff had been ordered to padlock the building, and he obviously had to remove everyone in the building, whether they were a party to the court's injunction or not. There was no allegation that any defendant prevented plaintiffs from assembling elsewhere to conduct a religious service or that defendant incarcerated the plaintiffs. (App. C, *infra,* 12a-14a).

The District Court dismissed claim for injunctive relief based on the abstention doctrine. *Younger v. Harris,* 401 U.S. 37 (1971). *Younger's* principles are applicable in cases which involve the contempt power of a state court. *Juidice v. Vail,* 430 U.S. 327, 335 (1977). Eight of the plaintiffs had alleged that they were members of the Faith Baptist Church, a corporation which was named as a defendant in the state court proceeding. Additionally, one federal plaintiff was named a defendant in the state court action. The interests of the parties seeking federal relief were closely related to those of the parties in the state court, and the federal plaintiffs made no attempt to distinguish themselves from the state court parties. In fact, the federal plaintiffs asked the District Court to determine the validity of the specific injunction issued against the state court parties. There was a clear absence of any indication that the state court proceedings were motivated by bad faith or based on a statute flagrantly violative of express constitutional provisions. (App. C, *infra,* 14a-21a).

4. A divided panel of the Court of Appeals for the Eighth Circuit reversed the judgment of the District Court,

reinstated the damage and injunctive relief claims, and remanded the action with directions to enter a declaratory judgment in favor of plaintiffs. (App. F, *infra,* 24a-36a). After setting forth a series of facts, many of which were unsubstantiated by the record (Reasons, *infra,* 28), the opinion held that law enforcement officers executing a court order are not clothed with absolute immunity, but with qualified, good-faith immunity where the court order is unconstitutional. (App. F, *infra,* 31a).

The opinion focused on the language of the state district court orders, particularly that of the initial order directing the padlocking of the building which was entered more than one year before the event in question. It observed that the Court of Appeals' duty in such instances was to construe the state court's order so as to avoid an unconstitutional result. The opinion stated that any order opening and closing the building according to a strict timetable without accommodating religious interests would be unconstitutional. *Schad v. Borough of Mt. Ephriam,* 452 U.S. 61, 76-77 (1981). (App. F, *infra,* 31a-35a).

Without inquiring as to what accommodations had been made by the state district court, the Court of Appeals thereupon construed the state district court's order of October 14, 1982 (App. A, *infra,* 1a-5a), in light of the prior state order of September 11, 1981 (D.R. 43-44). This earlier order of September 11, 1981, withdrawn after only two weeks when it appeared the private school was no longer operating in the building (App. A, *infra,* 1a-2a), contained a preamble that the building was to be unlocked Saturdays, Sundays, and such other times as the building shall be used for the holding of religious services (D.R. 44). From this language the Court of Appeals' opinion concluded that the state court order of October 14, 1982,

did not require the officers to padlock the building when it was being used for religious services notwithstanding the specific order to the Sheriff stating that the building was to be secured and padlocked at all times except "Wednesday evenings and throughout the weekends starting Saturday morning." (App. A, *infra,* 1a). The Court of Appeals further held that if there was any ambiguity in the latter state district court order, it must nonetheless be construed against the Sheriff so as to avoid unconstitutionality (App. F, *infra,* 31a).

Having so construed the state court orders, the opinion held the officers' actions were both unauthorized by court order and unconstitutional. The District Court's rationale for application of the doctrine of abstention to claims for declaratory and injunctive relief was summarily overruled based on the reinstatement of the damage claims. (App. F, *infra,* 35a-36a).

5. The dissenting judge would have upheld the District Court's dismissal of the case. (App. F, *infra,* 36a-40a). As he saw the matter, there was no ambiguity in the state court orders. "[T]he officers were faced with an unpopular but clearly stated assignment." (App. F, *infra,* 37a). He observed that an appellate court was not in a position to rely upon a generalized pre-order recital from a prior order for the purpose of construing the orders to the officers' detriment. (App. A, *infra,* 37a).

Since the officers had acted in accordance with the specific judicial commands of the state district court, the dissenting judge was of the opinion the officers were entitled to absolute immunity for the same reasons that judges, prosecutors and probation officers are afforded such immunity. *Stump v. Sparkman,* 435 U.S. 349 (1978); *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Tymniak v.*

*Omodt*, 676 F.2d 306 (8th Cir. 1982); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979). The officers' function in executing court orders was intimately and vitally associated with the judicial function. "It would be anomalous for the court to punish obedient law enforcement officers by exposing them to civil damage liability based on the shortcomings of orders drafted by absolutely immunized state judges. Furthermore, it would be unworkable for the officers to await interpretations from federal appellate judges rendered long after the orders were executed to learn whether they will be civilly liable for performing an assigned duty." (App. F, *infra*, 39a).

6. The petition for rehearing *en banc* was denied by a five to four vote of the active judges of the Court of Appeals for the Eighth Circuit. (App. H, *infra*, 42a). Judges Ross, John R. Gibson, Fagg and Bowman voted for rehearing *en banc*. Voting against were Chief Judge Lay and Judges Heaney, Bright, McMillian and Arnold.

## REASONS FOR GRANTING THE PETITION

1. Those who seek to invoke the jurisdiction of federal court must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy. *Jenkins v. McKeithen*, 395 U.S. 411, 421-425 (1969); *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Abstract injury is not enough. Plaintiffs must show that they have "sustained or [are] immediately in danger of sustaining some direct injury" as a result of the challenged official conduct, and the injury or threat of injury must be both "real and im-

mediate", not "conjectural" or "hypothetical." *See, e.g., Golden v. Zwickler,* 394 U.S. 103, 109-110 (1969); *United Public Workers v. Mitchell,* 330 U.S. 75, 89-91 (1947).

In *O'Shea v. Littleton,* 414 U.S. 488 (1974), a class of plaintiffs claimed they had been subjected to discriminatory enforcement of the criminal law. Among other things, a county judge and magistrate were accused of discriminatory conduct in various respects, such as sentencing members of plaintiffs' class more harshly than other defendants. As here, the Court of Appeals reversed the District Court's dismissal of the suit, ruling that if the allegations were proven, an appropriate injunction could be entered.

This Court reversed based on the failure of the complaint to allege a case or controversy. *Id.,* 414 U.S. at 493. Although it was alleged that particular members of plaintiffs' class had actually suffered from the alleged unconstitutional practices, this Court observed that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* 414 U.S. at 495-496. Past wrongs were evidence bearing on "whether there is a real and immediate threat of repeated injury." *Id.* 414 U.S. at 496. But the prospect of future injury rested on "the likelihood that [plaintiffs] will again be arrested and charged with violations of the criminal law and will again be subjected to bond proceeding, trial, or sentencing before petitioners." *Ibid.* No case or controversy could be found in those circumstances: the threat to the plaintiffs was not "sufficiently real and immediate to show an existing controversy simply because they anticipated violating lawful criminal statutes and being tried for their offenses . . ." *Id.* 414 U.S. at 496. It was to be assumed "that [plaintiffs] will conduct their ac-

tivities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners." *Id.*, 414 U.S. at 497.

*Golden v. Zwickler,* 394 U.S. 103 (1969), is also a case arising in an analogous situation. Congressman Zwickler sought a declaratory judgment that a New York statute prohibiting anonymous handbills directly pertaining to election campaigns was unconstitutional. Although Zwickler had once been convicted under the statute, he was no longer a Congressman apt to run for reelection. A unanimous Court held that because it was "most unlikely" that Zwickler would again be subject to the statute, no case or controversy of "sufficient immediacy and reality" was present to allow a declaratory judgment. *Id.*, 394 U.S. at 109.

No extension of *O'Shea* and *Golden* is necessary to hold that Respondents in this case have failed to demonstrate a case or controversy sufficient to justify injunctive or declaratory relief. Here the Faith Baptist Church, a corporation, its officers, and certain others were enjoined by the state district court from operating a private school or using the church property for the operation of a private school until such time as they complied with the Nebraska statutes and the rules and regulations of the State Department of Education governing approved schools. (D.R. 32-33). On appeal, the Nebraska Supreme Court affirmed, *Nebraska v. Faith Baptist Church,* 207 Neb. 802, 301 N.W.2d 571 (1981), and this Court dismissed for want of a substantial federal question, *Faith Baptist Church v. Nebraska,* 454 U.S. 803 (1981).

Subsequently, the Faith Baptist Church and one of its officers, Pastor Sileven, were found to be in contempt. This ultimately resulted in the entry of an enforcement

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order by the state district court on October 14, 1982, whereby the Sheriff was directed to secure the building in which was located the Faith Baptist Church and the private school by placing padlocks on the entrances thereto, the building to be open on Wednesday evenings and weekends until further order of the court. (App. A, *infra,* 1a-4a). Six days later, Wednesday, October 20, 1982, the state district court found that representatives of the Faith Baptist Church were desirous of holding a prayer meeting that afternoon in the building and that large numbers of nonresidents were present with the purpose of resisting the injunction, making the potential for violence great. Accordingly, the state district court withdrew its enforcement order, and the Sheriff removed the padlocks immediately, such locks having remained off the building to this date. (App. B, *infra,* 6a-7a).

It must be emphasized that the padlocks were removed from the building pursuant to the state district court order on October 20, 1982, and that Respondents' complaint was filed in the District Court on December 13, 1982. In other words, the building had been unlocked for almost two months before the Respondents filed their complaint in this matter. Thus, even if it were assumed that the state district court erred in directing the Sheriff to padlock the building or that the Sheriff misconstrued the order of the state district court, assumptions which are incorrect, the fact remains that the state district court order had been withdrawn almost two months before the federal complaint was filed. There was no allegation in the complaint that the state district court was about to reinstate its order. Rather, it is alleged only that the Sheriff may again padlock the building at some unknown future date. The spec-

ulative nature of such a claim requires a finding that Respondents have not met the Article III requirements for declaratory and equitable relief. *City of Los Angeles v. Lyons*, — U.S. —, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton, supra; Golden v. Zwickler, supra.*

Finally, the basis for the injunction and enforcement orders entered by the state district court was the Nebraska teacher certification law. *Nebraska v. Faith Baptist Church, supra.* That law was amended by L.B. 928 of the Eighty-Eighth Legislature of Nebraska which eliminated the requirement for state certification of teachers in private schools where the parents provide their written consent. *See,* Neb. Rev. Stat. § 79-1701 (Supp. 1984). Hence, even if Respondents' claims were not found to be speculative, there can still be no continuing, present adverse effects on which to demonstrate a present case or controversy as required by Article III of the Constitution.

2. The Court has held that judges are absolutely immune from civil suits for damages for all acts performed in their judicial capacity. *Stump v. Sparkman,* 435 U.S. 349 (1978); *Pierson v. Ray,* 386 U.S. 547 (1967). This immunity has been extended by the lower courts to law enforcement officers and others who carry out the orders of judges. *E.g., Slotnick v. Garfinkle,* 632 F.2d 163, 166 (1st Cir. 1980) (court clerk, sheriff and hospital superintendent who carried out judge's commitment orders shared the judge's absolute immunity); *Ashbrook v. Hoffman,* 617 F.2d 474, 476 (7th Cir. 1980) (commissioners appointed by a court to implement judicial decree

of partition shared the judge's absolute immunity even though unauthorized unconstitutional conduct was alleged); *Spaulding v. Nielsen*, 599 F.2d 728 (5th Cir. 1979) (probation officers who prepared presentence report at court's direction shared judge's absolute immunity); *Fowler v. Alexander*, 478 F.2d 694, 696 (4th Cir. 1973) (sheriff and jailor who confined plaintiff in execution of a court order were absolutely immune); *Burkes v. Callion*, 433 F.2d 318 (9th Cir. 1970), *cert. denied* 403 U.S. 908 (1971) (probation officer who prepared presentence report and court appointed medical examiner shared the judge's absolute immunity). A fundamental reason for these rulings was stated in *Blouin v. Dembitz*, 367 F.Supp. 415 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 488 (2nd Cir. 1973):

> Statutes and ruling case law protecting state judges in the discharge of their functions may not be circumvented or vitiated by pretending to maintain this suit also against their "clerk, servants and agents" for no court can discharge its judicial duties without the aid of clerks, servants and agents.

367 F.Supp. at p. 422.

Prior rulings of the Eighth Circuit concerning the immunity of law enforcement officers carrying out court orders were consistent with the authorities from the other circuits noted above. *Tymiak v. Omodt*, 676 F.2d 306, 308 (8th Cir. 1982) (sheriff implementing eviction order was absolutely immune from damages and injunctive relief claims); *Duba v. McIntyre*, 501 F.2d 590, 592 (8th Cir. 1974), *cert. denied*, 424 U.S. 975 (1976) (quasi-judicial immunity for police officers performing court orders); *Hevelone v. Thomas*, 423 F.Supp. 7, 9 (D. Neb. 1976), *aff'd*, 546 F.2d 797 (8th Cir. 1976) (sheriff implementing

padlocking order was absolutely immune and could not carry out order without evicting all occupants); *Rhodes v. Houston,* 202 F.Supp. 624 (D.Neb. 1962), *aff'd,* 309 F.2d 959 (8th Cir. 1962), *cert. denied,* 372 U.S. 909 (1963), *cert. denied,* 383 U.S. 971 (1966). The Court of Appeals' opinion in the present case held, to the contrary, that law enforcement officers executing a court order are not clothed with absolute immunity, but have only qualified, good-faith immunity where the order they are executing is unconstitutional. (App. F, *infra,* 35a).

The Court of Appeals reached this result by a two-step process. First, it held that *if* the state district court order in question authorized the padlocking of the building beginning on Monday, October 18, 1982, "the same to be unlocked for the holding of religious services on Wednesday evenings and throughout the weekends starting Saturday morning" (App. A, *infra,* 1a and 4a), *then* such order was unconstitutional in the judgment of the Court of Appeals. (App. F, *infra,* 31a-34a).

Second, the Court of Appeals noted that the state district court order in question had "reinstated" (App. A, *infra,* 4a) a prior order of September 11, 1981 (D.R. 43-44) which, in the preamble stated, "the building is to be unlocked Saturday and Sunday and such other times as the building shall be used for the holding of religious church services." *(Id.)* This same order went on, however, to provide:

> "IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the defendants, Reverend Everett Sileven and Faith Baptist Church, are in contempt of the orders of this Court and that the Sheriff of Cass County shall forthwith secure the building by the placing of locks on each of the entrances to the church; the building to be opened

> on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services."

*(Id.)* Based solely on the preamble of an order entered more than one year before the event in question, and without regard to the judgment in that order, the Court of Appeals held that the state district court's directions to the Sheriff in its order of October 14, 1982, were, at best, ambiguous, and that the Sheriff had acted unconstitutionally in following the clear command of the second order. (App. F, *infra*, 31a-34a).

Suffice it to say that this novel exception to the absolute immunity formerly granted by the Eighth Circuit to law enforcement officers carrying out court orders engulfs such immunity. Footnote 2 of the Court of Appeals' opinion (App. F, *infra*, 29a) appears to concede this point, but the opinion suggests that no harm is done since such officers remain protected by a qualified, good-faith immunity. (*Id.*, 35a). In footnote 4, the opinion states:

> The fact that the officers acted under color of the state-court orders will be relevant to this inquiry. There may enough ambiguity in the orders to warrant a determination by the District Court that the defendants reasonably believed that the orders mandated the action taken here and that the action was constitutional because the judge had ordered it.

*(Id.*, 35a)

The significance of depriving law enforcement officers of absolute immunity when they are carrying out court orders is best shown by reviewing the objective standard for qualified, good-faith immunity set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982):

> We therefore hold that government officials performing non-discretionary functions generally are shielded from liability for civil damages insofar as their con-

> duct does not violate clearly established statutory or constitutional rights . . . .

102 S.Ct. at 2738. The fulcrum of liability is whether or not at the time the officer acted there existed "clearly established" judicial decisions which made his action unconstitutional. *Id.*, 102 S.Ct. at 2739.

While the governmental official in *Harlow, supra,* had discretion whether or not to act, the law enforcement officer given a facially valid judicial order by a court having jurisdiction to issue said order does not have such discretion. The officer's alternatives are either to refuse to act and thus face possible contempt of court charges, or to execute the order and, under the Eighth Circuit's opinion, risk being held civilly liable if the action directed by the court order is unconstitutional. As recently stated by this Court in another context:

> In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policemen can do in seeking to comply with the law." . . . Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.

*U.S. v. Leon,* — U.S. —, 104 S.Ct. 3405, 3420 (1984) (citation omitted). Here there is no dispute as to either the basis for the state district court's order directing the Sheriff to padlock the building or as to the jurisdiction of the state district court to enter the order. When the state district court's order is "read in a straightforward fashion, the officers . . . were charged by a state judge with the responsibility to close and lock a church building on October 18, 1982, and to reopen it during specified periods." (App. F, *infra,* 37a, Fagg, J., dissenting). The

law enforcement officers are entitled to absolute immunity, and the Court of Appeals judgment should be reversed.

3. A state's attorney general and a prosecuting attorney are absolutely immune for actions made in connection with an official prosecution, even if maliciousness is alleged. *Imbler v. Pachtman, supra; White v. Bloom, supra; Rhodes v. Houston, supra.* Petitioners Douglas and Moravec were sued solely in their official capacity as Nebraska Attorney General and Cass County Attorney, respectively. As found by the District Court, "[t]here is no allegation that [Douglas and Moravec] ever acted outside of their official capacities; indeed, although paragraph 85 of the amended complaint seeks damages from all of the defendants, the plaintiffs' brief says explicitly that the only remedy sought against these two defendants is declaratory and injunctive relief and attorney's fees." (App. C, *infra,* 9a). The District Court also noted that Moravec had filed an affidavit (D.R. 84) which recites that his only connection with the padlocking incident was to initiate the enforcement and contempt proceedings in his capacity as Cass County Attorney. (App. C, *infra,* 9a).

Accordingly, the District Court held that Douglas and Moravec were absolutely immune and dismissed the monetary damage claims against them. (App. C, *infra,* 9a). The District Court also dismissed the declaratory and injunctive relief claims against Douglas and Moravec based on the abstention doctrine and the fact that plaintiffs were seeking a determination only as to the validity of the state district court's injunction. (App. C, *infra,* 14a-21a).

The Court of Appeals, however, apparently reversed *sub silentio* the District Court's dismissal of the claims for damages, declaratory and injunctive relief against Doug-

las and Moravec (App. F, *infra,* 36a) based on its holding that the state district court orders and the execution thereof were unconstitutional. Such judgment was clearly erroneous. Indeed, this is the only known case in which a state attorney general and a county prosecuting attorney have ever been held subject to damages, declaratory and injunctive relief under such circumstances.

4. The amended complaint, D.R. 22, alleges the County of Cass "is a body politic and corporate, and a political subdivision of the State of Nebraska." However, nothing in the amended complaint or in the designated record identifies any action, custom or policy of the County which allegedly deprived the Respondents of their constitutional rights. It is an elementary rule of pleading and procedure that a plaintiff must allege and prove more in his or her complaint than the defendant(s) name. *See, Baker v. McCollan,* 443 U.S. 137 (1979); *Prettyman v. State of Nebraska, County of Cass,* 537 F.Supp. 712 (D. Neb. 1982). Thus, the Court of Appeals erred when it reversed the District Court order dismissing Cass County from the case.

5. In *Younger v. Harris,* 401 U.S. 37, 43-54 (1971), this Court proscribed the federal courts from enjoining pending state criminal prosecutions except under extraordinary circumstances where the danger of irreparable loss is both great and immediate, such that the threat to the plaintiff's rights cannot be eliminated by his defense to the state court prosecution or except upon a showing of bad faith, harrassment or other unusual circumstances in the enforcement of an allegedly unconstitutional statute. *Younger's* principles have been extended to cases involving the contempt power of a state court. *Juidice v. Vail,* 430 U.S. 327, 335 (1977).

The District Court noted that the Supreme Court of Nebraska had affirmed the state district court injunction against the operation of the private school and upheld the constitutionality of the school certification laws upon which the injunction was based. *Nebraska v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). Additionally, this Court dismissed defendants' appeal from that decision for want of a substantial federal question. *Faith Baptist Church v. Nebraska*, 454 U.S. 803 (1981). The District Court also found that the state court proceedings were not motivated by a desire to harass or conducted in bad faith. Rather, "each step in the process has been authorized by court order . . . ." (App. C, *infra*, 21a). The District Court concluded:

> [I]ssuing the injunction requested by the plaintiffs would interfere with an ongoing state proceeding. The Supreme Court of Nebraska has declared that the Faith Baptist Church may not operate a school under certain conditions, and a lower state court repeatedly has issued injunctions to that effect. Two of those injunctions directed the sheriff to do precisely what the plaintiffs in this case would have me order him not to do—i.e., padlock the building used for the church school.

(App. C, *infra*, 16a-17a).

In reaching this conclusion, the District Court recognized that some of the federal plaintiffs were not parties to the state court proceedings, but it pointed out that at least eight federal plaintiffs alleged that they were members of the Faith Baptist Church, a corporation which was one of the defendants in the state court proceedings. Additionally, one of the federal plaintiffs, Ralph L. Liles, had been named a defendant in the state court action (App. C, *infra*, 18a). Thus, "the interests of the parties seeking

federal relief are closely related to those of the parties in state court, and the federal plaintiffs have made no attempt to distinguish themselves from the state court parties." (App. C, *infra,* 20a). The federal plaintiffs' interests were sufficiently intertwined with those of the state court defendants to justify invocation of the abstention doctrine. *Doran v. Salem Inn Inc.,* 422 U.S. 922, 928-934 (1975); *Hicks v. Miranda,* 422 U.S. 332, 348-349 (1975).

The Court of Appeals summarily rejected the District Court's rationale for invoking the abstention doctrine in response to plaintiffs' claims for declaratory and injunctive relief. The opinion stated, "[s]ince this amounts to a declaratory judgment and since the damages claim is now back in the case, there is no basis for abstention on the claims for prospective relief." (App. F, *infra,* 35a-36a). The presence or absence of damage claims, however, has nothing at all to do with the application of the abstention doctrine to declaratory and injunctive relief claims. *Younger, supra.* Moreover, plaintiffs here made no showing as to the presence of a "great and immediate" threat of irreparable injury. *Younger, supra,* 401 U.S. at 46. While the Nebraska school statutes underlying the contempt proceedings in the state district court have been amended, there are remaining in the Nebraska courts several contempt proceedings arising out of the original injunction entered by the state district court. *See, e.g., In re Liles,* 217 Neb. 414, 349 N.W.2d 377 (1984). Accordingly, the Court of Appeals erred when it reversed the District Court's invocation of the abstention doctrine.

6. As demonstrated above, the injunction (D.R. 33) granted by the state district court was reviewed by the Nebraska Supreme Court and by this Court. Its judgment

was affirmed. *Nebraska v. Faith Baptist Church, supra; Faith Baptist Church v. Nebraska, supra.* Subsequently, some of the defendants in that case, including the Faith Baptist Church, a corporation, were found in contempt of court on one or more occasions for operating the private school in violation of the injunction.

On the first contempt, April 24, 1981, the state district court permitted the private school to continue to operate for an approximate two week period, which was the balance of the school term, rather than run the risk of harm to the students by closure of the private school at that time. (D.R. 41). The state district court, however, admonished the Faith Baptist Church and its pastor that they must discontinue the school after the then current term, which was no later than May 30, 1981, unless they had complied with the Nebraska law for accreditation. (D.R. 42).

On September 11, 1981, the Faith Baptist Church, a corporation, and its pastor were both found in contempt. As a result, the state district court entered the following order:

> IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the defendants, Reverend Everett Sileven and Faith Baptist Church, are in contempt of the orders of this Court and that the Sheriff of Cass County shall forthwith secure the building by placing of locks on each of the entrances to the church; the building to be opened on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services. (D.R. 44).

The above order was enforced by law enforcement officers for a period of "approximately two weeks" when the state district court verbally directed the sheriff to withdraw enforcement, "it appearing that the injunction

was being complied with." (App. A, *infra,* 1a-2a). A notice of appeal was filed to the Nebraska Supreme Court. However, because no briefs were filed, the appeal was dismissed. *Sileven v. Tesch,* 212 Neb. 850, 326 N.W.2d 850, 852 (1982).

On February 12, 1982, the pastor was again found in contempt for violating the injunction and was ordered confined to the county jail for a period of four months. (D.R. 46). He was released from jail after serving 13 days when he filed an affidavit under oath, claiming to have "severed all connections, duties and responsibilities in the operation of the Faith Baptist School . . . ." (*Id.*)

On May 6, 1982, the pastor of the Faith Baptist Church was again found in contempt and was ordered confined in the county jail for a period of 3 months and 17 days, such confinement to begin September 1, 1982. In the interim, he was released without recognizance. (D.R. 51). He did not surrender himself on September 1, 1982, whereupon a bench warrant was secured for his arrest (D.R. 52-54).

On September 23, 1982, the Cass County Attorney filed a motion and affidavit wherein he prayed the state district court to authorize and direct the Sheriff of Cass County to carry out the provisions of the order of the state district court of September 11, 1981, whereby locks would be placed on the church for the reason that several visiting preachers were assisting the parents and members of the church in keeping the private school open in violation of the injunction. (D.R. 56). On October 6, 1982, the Cass County Attorney filed a supplemental motion wherein he alleged the private school was still in operation and moved the court "that locks be placed on each of the entrances to the building to be opened for religious services at such

times as the Court deems necessary or advisable." (D.R. 57-61). The same came on for hearing on October 14, 1982, at which time the state district court judge entered an order wherein he summarized the above described motion and supplemental motion filed by the Cass County Attorney and then interpreted his above quoted order of September 11, 1981, as follows:

> "[T]hat order directing the sheriff to procure and install additional locks to keep the building secured, the same to be unlocked for the holding of religious services on Wednesday evenings and throughout the weekends starting Saturday mornings.

(App. A, *infra,* 1a). The state district court then summarized some of the past proceedings in this matter, made certain findings of fact, and then stated:

> The Court has this date determined that the school is still being operated in violation of the injunction order; that they have failed to seek initial approval status as an approved school system or an attempted compliance with the other requirements as found in the injunction order; and that the initial Order of September 11, 1981, directing the sheriff to secure the school building should be reinstated, directing the sheriff to secure the school building, the orders of this Court prohibiting the operation of a school for the teaching of non-religious subjects to be enforced. The building shall remain open on Wednesday evenings and throughout the weekend, the sheriff to withdraw security on Friday evenings at 5:00 p.m. and to enforce the order prohibiting the operation of a school on each Monday through Friday until further order of this Court. (App. A, *infra,* 4a).

Thus, there can be no doubt that Sheriff Tesch had an absolute legal duty to padlock the building on October 18, 1982, after clearing it, of course, of any of its occupants. For the Court of Appeals to hold that the Sheriff Tesch did not have such a duty is reversible error.

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There being no issue as to the jurisdiction of the state district court in the contempt proceeding to impose sanctions by issuing the Order of October 14, 1982, the Court of Appeals absolutely lacked jurisdiction to review and determine the constitutionality of that order. Only this Court could review that order and then only after it had been reviewed by the Nebraska Supreme Court. 28 U.S.C. § 1257. As recently stated by this Court in *District of Columbia Court of Appeals v. Feldman*, — U.S. —, 103 S.Ct. 1303, 1317, 75 L.Ed.2d 206, 225 (1983):

> [United States District Courts] do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings *even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court.*

[Emphasis supplied.] Thus, the Court of Appeals erred when it undertook to review the state district court's order of October 14, 1982.

Moreover, even if it were assumed that the Court of Appeals had jurisdiction, an assumption which is incorrect, surely the principles of comity would prevent the Court of Appeals from placing a different interpretation on the state district court order of September 11, 1981, than was placed thereon by the same state district court judge who drafted the order. (App. A, *infra*, 1a). If the state district court orders of September 11, 1981, and October 14, 1982, are to be construed in this case, the very least the Court of Appeals should have done was to certify the question(s) it had about the two orders to the Nebraska Supreme Court. Neb. Rev. Stat. § 24-219 (Supp. 1984). For the Court of Appeals to construe to the two (2) subject state court orders in a manner different

from the construction placed thereon by the state district court judge who drafted them and as a result hold "that the officers' action was unconstitutional" is an insult to the principles of comity and to the majesty of the law itself.

If the Court of Appeals had jurisdiction, it also erred when it directed entry of a declaratory judgment in the absence of an indispensable party. (D.R. 26). Sheriff Tesch did not padlock the building on his own whim, but did so pursuant to the command of the October 14, 1982, order of the state district court. To enter a declaratory judgment and an injunction against a law enforcement officer in these circumstances is to put the officer between a hard spot and a rock. If he executes the order, he can be liable for damages and attorney fees in the federal courts. If he refuses to execute the order, he can be held in contempt by the state district court.

If it is assumed that the Court of Appeals had jurisdiction in this matter, an assumption which is incorrect, there is a failure to join an indispensable party or at the very least there is a failure to afford Sheriff Tesch due process by permitting him to call the state district court judge who drafted the subject order as a witness to testify as to his interpretation thereof. *Pulliam v. Allen,* — U.S. —, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984); *Fountain v. Filson,* 336 U.S. 681 (1949).

The purpose of introducing selected parts of the state court record with the Petitioners' motion to dismiss was merely to demonstrate that an order was entered by the state district court requiring certain ministerial actions by law enforcement officers and not to demonstrate the legal and constitutional sufficiency of the same. If the Court of

Appeals had jurisdiction to review the orders of the state district court, the petitioners have obviously been denied an adequate opportunity to show by a complete record, rather than by contesting inaccurate characterizations of opposing counsel, that the state district court order was constitutional and properly executed. That calls for an exercise of this Court's power of supervision.

The opinion of the Court of Appeals in reviewing and construing the orders of the state district court and in directing entry of a declaratory judgment against the Petitioners based on their motions to dismiss does not conform to Rules 12(b) and 56(c). It is submitted that there is no evidence in the designated record that will support the following quotes found in the opinion of the Court of Appeals:

(1) The Sheriff arrived at the building "with fifteen carloads of deputies and state troopers" (App. F, *infra,* 27a);

(2) The plaintiffs "were conducting a 'prayer vigil'" (*Id.*);

(3) The plaintiffs were "singing, preaching, reading the Bible, praying, and so forth, to protest the jailing of Mr. Sileven and the closing of the school." (*Id.*);

(4) "No school children were present" (*Id.*); and

(5) "[N]o classes were being held." (*Id.*).

Petitioners can only conclude that the above-listed quotations were obtained by the Court of Appeals from statements of opposing counsel in his brief or oral argument. It is elementary that statements made by counsel in their briefs or on oral argument as to facts outside the record do not constitute facts for the purpose of judicial findings required by Rules 12(b) and 56(c), Fed.R.Civ.P. *E.g., Trinsey v. Pagliaro,* 229 F.Supp. 647 (E.D. Pa. 1964).

Clearly, such findings by the Court of Appeals should be vacated as well as its direction to the District Court to enter declaratory judgment.

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## CONCLUSION

For any or all of the reasons discussed herein, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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## APPENDIX A

IN THE DISTRICT COURT OF
CASS COUNTY, NEBRASKA

DOCKET 24 PAGE 138

STATE OF NEBRASKA, ex rel.
PAUL L. DOUGLAS, Nebraska
Attorney General, et al.,
Plaintiffs,

vs.

FAITH BAPTIST CHURCH OF LOUISVILLE,
NEBRASKA, a corporation; FAITH CHRISTIAN
SCHOOL, Louisville, Nebraska;
EVERETT SILEVEN, et al.,
Defendants.

ORDER

(Filed October 14, 1982)

Now on this 14th day of October, 1982, the above entitled comes before the Court on the Motion and Affidavit of Ronald D. Moravec, County Attorney of Cass County, Nebraska, and the Supplemental Motion and affidavit of Larry Shelbourn, Chief Deputy to the Sheriff of Cass County, Nebraska. The Motion and Supplemental Motion in substance pray for an additional order directing the sheriff to enforce the orders of this Court as set out on September 11, 1981; that Order directing the sheriff to procure and install additional locks to keep the building secured, the same to be unlocked for the holding of religious services on Wednesday evenings and throughout the weekends starting Saturday mornings.

This Order was enforced by the enforcement officers of this county for a period of approximately two weeks at which time the Court was informed that the school was no

longer operating in the school building. The Court then verbally directed the sheriff to withdraw enforcement officers, it appearing that the injunction order was being complied with.

The affidavit of the county attorney generally advises the Court that the school was re-opened on September 15, 1982, in violation of the injunction order; and the affidavit of Deputy Shelbourn further advises the Court that the same has been in operation and on October 4, 1982, the school building was entered, the officers observing that twenty-nine pupils were in attendance at the school and that the same was continuing to operate in violation of the injunction order.

As a resume of the proceedings which have transpired in the past, the records reflect that this matter was filed on April 24, 1979, with the Attorney General and the County Attorney of Cass County, Nebraska, appearing as plaintiffs, and Faith Baptist Church of Louisville, Nebraska, Faith Christian School of Louisville, Nebraska, Reverend Everett Sileven, Edgar Gilbert, Tressie Sileven, Martha Gilbert, Helen Aldrich, Ralph Liles, Kenneth Heard, David Carlson and Walter Peterson as defendants.

The case reached issue and was heard in this court on July 16, 17 and 18, 1979; and after allowance of time for briefs, the Court, on September 11, 1979, found that Faith Baptist Church was conducting a school with non-certified teachers and administrators and had failed to comply with the requirements for accreditation under the laws of this state. The injunction was then issued.

This was appealed to the Supreme Court of this state who issued its opinion on January 30, 1981, affirming the

rulings of this Court. The constitutional questions raised were attempted to be submitted to the United States Supreme Court and were denied. In a letter from the Clerk of the Supreme Court of the United States directed to the Attorney General of Nebraska and signed by Alexander L. Stevas as Clerk, the Court was advised that an Order had been entered in this case which read as follows: "The appeal is dismissed for want of a substantial federal question. Justice O'Connor took no part in the consideration or decision of this case."

The school was subsequently re-opened and in a contempt proceeding this Court entered a sentence of confinement to the jail of the county for a period of four months as to the defendant Reverend Everett Sileven, he being found to be in contempt of the court orders. At that time he served a period of thirteen days, the school once again being closed and at which time the Court was led to believe that the parties had purged themselves. The school subsequently opened once again and the Court, in a hearing, on the stipulations of the parties, found the defendant Reverend Everett Sileven to be in contempt once again and confined him to the jail of the county for the balance of the four months, the confinement to start on September 1, 1982.

The defendant failed to surrender himself on that date, and under a bench warrant was arrested on September 3rd and is presently incarcerated in the Cass County Jail.

The issues in this case have been passed upon twice by the Supreme Court of Nebraska, the first being in *Meyerkorth v. State* (1962) identified as 173 Neb. 889, 115 N.W.2d 585, and subsequently in the present case which is identified as 207 Neb. 802, 301 N.W.2d 571.

The Court has this date determined that the school is still being operated in violation of the injunction order; that they have failed to seek initial approval status as an approved school system or an attempted compliance with the other requirements as found in the injunction order; and that the initial Order of September 11, 1981, directing the sheriff to secure the school building should be reinstated, directing the sheriff to secure the school building, the orders of this Court prohibiting the operation of a school for the teaching of non-religious subjects to be enforced. The building shall remain open on Wednesday evenings and throughout the weekend, the sheriff to withdraw security on Friday evenings at 5:00 p.m. and to enforce the order prohibiting the operation of a school on each Monday through Friday until further order of this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the Order of this Court entered September 11, 1981, shall be reinstated, the Sheriff of Cass County and his enforcement personnel to enforce the Order of this Court prohibiting the operation of a non-approved school, the first enforcement thereof to be exercised Monday, October 18, 1982; it being the intent of the Court that the parents of children attending thereat shall have advance notice of the action taken by the Court.

Dated this 14th day of October, 1982.

BY THE COURT:

/s/ Raymond J. Case
District Judge

STATE OF NEBRASKA)
)SS
COUNTY OF CASS )

Received this Order on the 14th day of October, 1982, and according to the command thereof, on the morning of October 18, 1982, I cleared the church of its occupants, and padlocked the doors securing the building.

Dated this 2nd day of November, 1982.

/s/ Fred Tesch
Sheriff

## APPENDIX B

IN THE DISTRICT COURT OF
CASS COUNTY, NEBRASKA

DOCKET 24 PAGE 138

STATE OF NEBRASKA, ex rel.
PAUL L. DOUGLAS, Nebraska
Attorney General, et al.,
Plaintiffs,

vs.

FAITH BAPTIST CHURCH of Louisville,
Nebraska, a Corporation; FAITH CHRISTIAN
SCHOOL, Louisville, Nebraska;
EVERETT SILEVEN, et al.,
Defendants.

ORDER

(Filed October 20, 1982)

Now on the 20th day of October, 1982, the Court having met with representatives of the Faith Baptist Church and having been advised that large numbers of their group were desirous of holding a prayer meeting to start in mid-afternoon, the Court forthwith called enforcement personnel, directing them to remove their personnel and any other methods used in securing the building to the extent that the religious service could proceed without delay.

And the Court thereafter having consulted with the County Attorney's Offices and being well and fully advised in the premises finds that there are going to be large groups who have traveled long distances who are non-residents of the State of Nebraska whose purposes are to resist the laws of this state as interpreted by the courts thereof, and that the potential for violence is great.

The Court further finds that enforcement personnel are insufficient in number to cope with the potential violence and that the enforcement orders of September 11, 1981 and October 14, 1982, should be suspended until further order of this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the orders of the Court entered September 11, 1981 and October 14, 1982, be and the same are hereby suspended until further order of this Court.

Dated this 20th day of October, 1982.

BY THE COURT:

/s/ Raymond J. Case
District Judge

STATE OF NEBRASKA)
)SS
COUNTY OF CASS )

Received this Order on the 20th day of October, 1982, and I hereby complied with the suspension of the Orders of the Court entered September 11, and October 14, 1982, by unlocking the church doors, and leaving my padlocks off.

Dated this 2nd day of November, 1982.

/s/ Fred Tesch
Sheriff

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-659

ROBERT E. McCURRY, et al.,
Plaintiffs,

vs.

FRED TESCH, et al.,
Defendants.

### MEMORANDUM ON MOTIONS TO DISMISS

(Filed July 28, 1983)

This action arises out of the well-publicized efforts of the District Court of Cass County, Nebraska, and Nebraska law enforcement officials to prevent the operation of an uncertified school by the Faith Baptist Church of Louisville, Nebraska. The amended complaint, filing 7, alleges that the defendants caused the sheriff's department and the state patrol to raid a church service at the Faith Baptist Church and that during the raid the plaintiffs were forcibly removed from the church and the church was padlocked. The complaint seeks $1 million in damages from each of the defendants and a permanent injunction restraining the defendants from locking the church or otherwise interfering with the plaintiffs. The defendants have filed separate motions to dismiss, filings 8 through 13; they claim that they acted solely in their official capacities and that the "raid" actually was a good faith effort to enforce an injunction entered by the District Court of Cass County to prevent the operation of an uncertified school.

I turn first to the plaintiffs' claims for monetary damages. A state's attorney general and a prosecuting attorney are absolutely immune for actions made in connection with official prosecutions, even if maliciousness is alleged. *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Rhodes v. Houston,* 202 F. Supp. 624, 633 (U.S.D.C. Neb.), aff'd 309 F.2d 959 (C.A. 8th Cir. 1962), cert. denied 372 U.S. 909 (1963), cert. denied 383 U.S. 971 (1966); *White v. Bloom,* 621 F.2d 276, 280 (C.A. 8th Cir. 1980). Similarly, a quasi-judicial form of immunity extends to police and other court officers for purely ministerial acts where they do nothing other than perform court orders. *Rhodes,* supra, 202 F. Supp. at 636; *Duba v. McIntyre,* 501 F.2d 590, 592 (C.A. 8th Cir. 1974); *Hevelone v. Thomas,* 423 F. Supp. 7, 9 (U.S. D.C. Neb. 1976).

The defendants Douglas and Moravec are sued solely in their official capacities as attorney general and county attorney. There is no allegation that they ever acted outside of their official capacities; indeed, although paragraph 85 of the amended complaint seeks damages from all of the defendants, the plaintiffs' brief says explicitly that the only remedy sought against these two defendants is declaratory and injunctive relief and attorney's fees. Moravec has filed an affidavit, filing 12, which says that his only connection with this incident was to seek an injunction in his capacity as county attorney. Douglas and Moravec are absolutely immune; the monetary damages claims against them will be dismissed.

The defendants Tesch, Syslo, and Shelbourn also are entitled to absolute immunity, because their actions were to enforce an injunction issued by a state court. In an order dated September 11, 1981, Judge Raymond Case of

the District Court of Cass County found the Faith Baptist Church in contempt of court because it continued to operate the Faith Christian School with uncertified teachers and directed Sheriff Tesch to "procure and install additional locks on each of the entrances to the church and school, it being one building, and to keep the building secured." The judge said that the building was to be unlocked Saturday, Sunday, and such other times as church services were to be held. However, the order directed the sheriff to "secure the building by the placing of locks on each of the entrances to the church; the building to be open on Saturday, Sunday, and Wednesday evenings for the singular purpose of religious services." Exhibit B to filing 8. That order was later withdrawn.

On October 14, 1982, Judge Case reinstated his September 11 order, directing the sheriff to secure the building, to open it on Wednesday evenings and weekends, and to prevent the operation of a school in the building each Monday through Friday; Sheriff Tesch was ordered:

> ". . . to enforce the Order of this Court prohibiting the operation of a non-approved school, the first enforcement thereof to be exercised Monday, October 18, 1982; it being the intent of the Court that the parents of children attending thereat shall have advance notice of the action taken by the Court."

It is not clear what notice the defendants in that action received of the hearing of the order itself. The plaintiffs here have submitted with their brief a purported copy of a letter dated October 6, 1982, to Judge Case which says that the defendants in the state case had not received formal notification of the motion requesting an injunction. The exhibit, marked "D," has not been filed with this

court, nor has its authenticity been established by any form of affidavit or notarization. Even if I could use it as evidence, it would only establish that as of October 6, 1982, the defendants in the state case did not know of the motion for an injunction; it does not show that they did not learn of the October 14, 1982, injunction or that they did not have an opportunity to contest the injunction.

The amended complaint alleges that at 6:09 a.m. on October 18, 1982, law enforcement officers invaded the church, removed the plaintiffs, and padlocked the church. This is no more than the two court orders required the defendants to do. The court directed the defendants to padlock the entire building beginning October 18, and they did. Obviously, the defendants could not execute the injunction and padlocked the building without removing all the people in the building. *Hevelone v. Thomas,* supra, 423 F. Supp. at 9. Although the plaintiffs allege that the defendants' actions disrupted a church service, this does not abrogate the defendants' immunity. Judge Case's orders did not give the sheriff the authority to decide that the building should not be padlocked because it was being used for church services, nor did they say that the sheriff could choose to padlock the building if he believed that terminating the church service was necessary to prevent the operation of the school later in the day. Therefore, the plaintiffs' citation of *De Jonge v. Oregon,* 299 U.S. 353 (1937), and *Hague v. Committee for Industrial Organization,* 307 U.S. 496, 516 (1939), is not relevant. In *Hague,* a city official could deny a meeting permit if in his mere opinion doing so would prevent a riot, a situation the court said created an instrument of arbitrary suppression. 307 U.S. at 516. Here, the sheriff did not have discretion to

allow certain activities in the building but not others; he was to padlock the church on October 18. In *De Jonge*, the defendant was arrested solely because he attended a peaceful meeting held by the Communist Party. The plaintiff were not arrested nor were they removed from the church because they were attending a church service; they were removed to enforce an injunction against the operation of a school.

The plaintiffs argue that if Judge Case's orders did authorize the interruption of a church service, then they were unconstitutional. That argument is of no use here. First, I cannot determine whether the injunction was constitutional. It was issued by a state court, and the proper way to contest its constitutionality is to appeal it to the Supreme Court of Nebraska. A federal district court cannot hear an appeal from a state court. *District of Columbia Court of Appeals v. Feldman,* 51 U.S.L.W. 4285, 4291 (March 23, 1983). Second, even if I could hold the law unconstitutional, that would not affect the defendants' immunity. An injunction issued by a state court which had proper jurisdiction must be obeyed unless it is transparently invalid or based on frivolous pretenses. *Walker v. City of Birmingham,* 388 U.S. 307, 315 (1967). The injunction was issued by a court with jurisdiction, and it was not transparently invalid. Cf. *Walker,* supra, at 317 (injunction against march by civil rights group "unquestionably subject to substantial constitutional question" yet not transparently invalid). Sheriff Tesch had no choice but to obey it.

The plaintiffs argue that Judge Case's order was obtained without procedural due process and point out that counsel for the church had protested to the court that he

had not as of October 6, 1982, received notice of the motion for the injunction, contending that this shows that the order was an unconstitutional ex parte restraint of First Amendment freedoms. *Carroll v. Commissioners of Princess Anne,* 393 U.S. 175, 180 (1968).

Even if that be true, I do not have the authority to overturn a state court injunction by means of a collateral attack on it. Also, I do not know whether the defendants who were enjoined had notice of the injunction and hearing, as I have already pointed out. I would point out further that the plaintiffs here do not have standing to contest an injunction against the defendant parties in the state court case, although I observe that no fewer than eight of the plaintiffs in this case allege that they were members of the Faith Baptist Church, which was a party to the injunction, and that Ralph Liles, a plaintiff in this case, was named as a defendant in the caption of the September 11 order (the caption of the October 14 order does not list all of the defendants). Finally, the plaintiffs' argument ignores the reality of the situation. The sheriff had been ordered to padlock all entrances to the building and he obviously had to remove everyone in the building, whether they were party to the court's injunction or not. There is no indication in the record that the defendants prevented the plaintiffs from assembling elsewhere to conduct a religious service or that the defendants incarcerated the plaintiffs. Indeed, the amended complaint indicates that the defendants merely removed the plaintiffs and prevented them from reentering the church.

I do not doubt that the plaintiffs have a constitutional right to assemble in order to exercise their religion, but I am not at all sure that they have a right to assemble for

religious purposes on the particular piece of private property that they chose to use. If Judge Case had closed the church for violating local building, fire and safety codes, for example, I do not see how those plaintiffs who are not members of the church would be free to assemble there. In a sense, the right of nonmembers to assemble in the church derives from the right of the church's members to assemble there. Certainly, the rights of nonmembers to use church property cannot be greater than the rights of the church's members. Therefore, if an injunction limited the uses to which church members could put the property, it must also limit the uses to which nonmembers can put the property.

The defendants suggest that the plaintiffs were not denied their constitutional rights, because the injunction was a legitimate time, place and manner restriction, see *Adderly v. Florida,* 385 U.S. 39 (1966), and that the court order served a significant government interest in preventing the violation of state education laws. Again, because I do not have the authority to determine the validity of the state court's orders, I shall not comment on this argument.

The defendants Tesch, Shelbourn, Syslo, Moravec and Douglas are absolutely immune from the plaintiffs' claim for damages; Count I will be dismissed.

Count II of the amended complaint alleges that the defendants will continue to violate the plaintiffs' rights and requests a permanent injunction which would prohibit the defendants from padlocking the church and otherwise interfering with the constitutional rights of the plaintiffs and other worshipers. I shall dismiss this count against

all of the defendants, because under the principles of *Younger v. Harris*, 401 U.S. 37 (1971), I do not have the authority to issue an injunction which would interfere with state court proceedings.

To understand my concern, a review of the litigation surrounding the Faith Baptist School is necessary. Several years ago the District Court of Cass County enjoined the operation of an elementary school by Faith Baptist Church and the Church's officers and employees, including the Reverend Everett Sileven. The Supreme Court of Nebraska affirmed that injunction and upheld the constitutionality of the school certification laws upon which the injunction was based. *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). The Supreme Court of the United States dismissed the defendants' appeal for want of a substantial federal question. *Faith Baptist Church v. Nebraska ex rel. Douglas*, 454 U.S. 803 (1981).

On March 27, 1981, the state district court again enjoined the church, the school, and several individuals from further operation of a private school or the use of church property for the operation of a private school until they complied with Nebraska law. Once again on September 11, 1981, the state district court enjoined the operation of the school and ordered the building padlocked. Apparently, Sileven appealed the injunction, but his appeal was dismissed because he failed to file briefs. See *Sileven v. Tesch*, 212 Neb. 880, 882, 326 N.W.2d 850, 852 (1982). Several members of the church sought an injunction in federal district court against Cass County and county attorney Moravec which would prevent the defendants from prohibiting the school's operation. Judge Robinson rejected

the request and dismissed the lawsuit. *Prettyman v State of Nebraska, County of Cass*, 537 F. Supp. 712 (U.S.D.C. Neb. 1982). A series of legal proceedings then transpired in the state district court, and Sileven was arrested and jailed on September 3, 1982. Both the Supreme Court of Nebraska and this court denied Sileven's petitions for habeas corpus. *Sileven v Tesch*, 212 Neb. 880, 326 N.W.2d 850 (1982); *Sileven v Tesch*, CV82-0-712 (U.S.D.C. Neb. 1983). Meanwhile, the state district court reinstated its order of September 11, 1981, and ordered the sheriff to padlock the building which housed the church and school on October 18, 1982. On October 20, 1982, Judge Case entered an order which stated:

> ". . . there are going to be large groups who have traveled long distances who are non-residents of the State of Nebraska whose purposes are to resist the laws of this state as interpreted by the courts thereof, and . . . the potential for violence is great.
>
> "The Court further finds that enforcement personnel are insufficient in number to cope with the potential violence and . . . the enforcement orders of September 11, 1981 and October 14, 1982, should be suspended until further order of this Court."

On November 29, 1982, county attorney Moravec applied for a warrant for Sileven's arrest, alleging that Sileven had resumed operation of the school. The last page in the presumably partial record from the state district court, Exhibit B to filing 8, indicates that Judge Case issued the requested warrant on November 29, 1982. There are no other court documents available to me which would indicate the current status of those proceedings.

I believe that I must conclude that issuing the injunction requested by the plaintiffs would interfere in an on-

going state proceedings. The Supreme Court of Nebraska has declared that the Faith Baptist Church may not operate a school under certain conditions, and a lower state court repeatedly has issued injunctions to that effect. Two of those injunctions directed the sheriff to do precisely what the plaintiffs in this case would have me order him not do— i.e., padlock the building used for the church and school. There is no indication that the state court has released jurisdiction of the action against Faith Baptist and there are strong indications that it may again use the injunctive relief which the plaintiffs contest. Indeed, the plaintiffs' brief says that the plaintiffs seek to determine the validity of the orders that have been issued and any similar future orders. The term "proceedings" is to be read broadly as including all steps taken or which may be taken in or by the state court from the institution to the close of the final process. *Hill v. Martin*, 296 U.S. 393, 403 (1935). A plaintiff cannot circumvent matters by seeking to prohibit use of the results of a completed state court proceeding. *Id.*, quoting *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970).

Here, the plaintiffs' requested injunction would interfere with a state court's ability to enforce its judgment and thus with an ongoing state proceeding. That interference is prohibited by the doctrine established in *Younger v Harris*, supra, which proscribes a federal court from enjoining pending state criminal proceedings, except under extraordinary circumstances where the danger of irreparable loss is both great and immediate. 401 U.S. at 43-54. *Younger's* principles have since been expended to include cases involving the contempt power of a state court, *Jui-*

*dice v Vail,* 430 U.S. 327, 335 (1977), and civil enforcement actions brought by a state in its sovereign capacity. *Trainor v Hernandez,* 431 U.S. 434 (1977). Both of these types of actions are present here.

A *Younger* analysis in this case is somewhat complicated by the fact that some of the plaintiffs were not parties to the state court proceedings against Faith Baptist Church and some were. For the record, I point out that the plaintiffs Billy Arnold, Charles and Jesse Day, Phillip A. Schmidt, Harvey Schulz, Gary Lee Peterson, Ralph L. Liles, Phillip Liles, and Jean Perry allege that they are members of the Faith Baptist Church. The state court proceedings which produced the injunction in question name the Faith Baptist Church, a corporation, as one of the defendants. Ralph L. Liles, a plaintiff in this action, is named defendant in the state court action and a plaintiff in *Prettyman,* supra.

In *Hicks v Miranda,* 422 U.S. 332 (1975), the court held that a federal district court should have abstained from considering a theatre owner's federal suit where state criminal proceedings were pending against two of the theatre's employees. The court said that *Younger* applied, because the owner's interests and those of his employees were intertwined and that the owner was attempting to interfere with the pending state criminal prosecution against his employees through the federal suit. 422 U.S. at 348-349. Later, in *Doran v Salem Inn, Inc.,* 422 U.S. 922, 928-934 (1975), the court said that where a state criminal proceedings had been started against only one of the three federal plaintiffs, all of whom were tavern-operating corporations, *Younger* did not prevent the other two

from seeking an injunction. 422 U.S. at 928-929. However, the court observed that there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the *Younger* considerations which govern any one of them; this was not true in *Doran*, because each of the corporations was owned and operated independently of the others. *Id.*

The Eighth Circuit Court of Appeals has considered the issue of intertwined interests in two cases. In *Stivers v. Minnesota*, 575 F.2d 200 (1979), cert. denied 439 U.S. 1127 (1979), Divorce Education Associates, Inc. was sued in state court for the unauthorized practice of law. Several of the corporation's members then sued in federal court, alleging that the state proceeding threatened their involvement in the corporation. The court held that *Younger* applied, because the interests of the parties seeking relief in federal court were closely related to those of the parties in state court and the federal action sought to interfere with the pending state proceedings. The court also noted that the federal plaintiffs had not attempted to distinguish their interests from the interests of the state court parties. 575 F.2d at 203.

The circuit court reached the opposite result in *Womens Services, P.C. v. Douglas*, 653 F.2d 355 (1981). Womens Services had challenged the constitutionality of three abortion statutes in federal district court after the state started criminal proceedings against a doctor employed by Womens Services. The court's opinion explicitly said that the crucial factor in the case was the fact that Womens Services did not seek to enjoin the state criminal proceeding against the doctor. The court also said that the

injunction requested in federal court would protect only Womens Services while leaving the state free to continue its prosecution of the doctor. The court pointed out that the doctor had been charged under two state statutes but that Womens Services was also challenging a third statute, which the doctor lacked standing to challenge. 653 F.2d at 356, 359.

In the case here, the interests of the parties seeking federal relief are closely related to those of the parties in state court, and the federal plaintiffs have made no attempt to distinguish themselves from the state court parties. Indeed, in their brief at page 10 the plaintiffs specifically say that they seek to determine the validity of the injunction issued against the state parties. This factor also distinguishes this case from *Womens Services*, for the federal plaintiffs here are asking me to review the validity of the state proceedings against Faith Baptist Church and Sileven and are seeking an injunction, the practical effect of which would be to deprive the state court of one of the enforcement mechanisms it has repeatedly used against the state parties. Unlike *Womens Services*, granting the federal plaintiffs' injunction here would not leave the state free to pursue its action against the state parties. The other difference is that while Womens Services challenged a statute which the doctor in state court did not have standing to challenge, the federal plaintiffs in this case are challenging, in effect, the specific injunction which was issued in the state court proceedings. I concluded that the federal plaintiffs in this case and the defendants in the state court proceedings are sufficiently intertwined to invoke the application of the *Younger* doctrine.

It is true that *Younger* would not apply if I were to find that the state court proceedings were motivated by a desire to harass, had been conducted in bad faith, or were based on a statute which is flagrantly and patently violative of express constitutional provisions in every clause, sentence and paragraph. *Juidice v Vail,* supra, 430 U.S. at 338. But that is not the case here; each step in the process has been authorized by court order, and the statute in question is not flagrantly violative of an express constitutional provision. See *Hicks v Miranda,* supra, at 351-352, and *Grandco Corp. v Rochford,* 536 F.2d 197, 202 (C.A. 7th Cir. 1976) (*Younger* applied even where state law was unconstitutional).

Finally, I note that the amended complaint adds Cass County as a defendant. Nothing in the amended complaint identifies any action, custom or policy of the county which allegedly deprived the plaintiffs of their constitutional rights. Indeed, the only reference to the county in the body of the amended complaint is an allegation that the county is a political subdivision of the State of Nebraska. I shall dismiss the county as a defendant. *Prettyman,* supra, 537 F. Supp. at 716. See, generally, *Baker v McCollan,* 443 U.S. 137, 145 (1979).

Dated July 28, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-659

ROBERT E. McMURRY, et al,

Plaintiffs,

vs.

FRED TESCH, et al,

Defendants.

ORDER OF DISMISSAL

(Filed July 28, 1983)

For the reasons stated in the accompanying memorandum,

IT IS ORDERED that the motions of the defendants Tesch, Shelbourn, Douglas, Syslo, Moravec, and Cass County to dismiss, filings 8, 9, 10, 11, 12 and 13, respectively, are granted and the action is dismissed.

Dated July 28, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

Entered on the Docket July 28, 1983
William L. Olson, Clerk

By Patricia L. Nelson, Dep. Clerk

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV82-L-659

ROBERT E. McCURRY et al,

Plaintiffs,

vs.

FRED TESCH, et al,

Defendants.

ORDER

(Filed July 29, 1983)

IT IS ORDERED that the memorandum on motions to dismiss, dated July 28, 1983, is amended in that the last word in the first paragraph of page 1 is changed from "church" to "school."

Dated July 29, 1983.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

## APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2191

Robert E. McCurry; H. Edward Rowe; Richard C. Moore; Greg Dixon; Dennis Brown; Robert A. Collins; Richard L. Weightman; Dennis A. Corle; Daniel Eylar; David A. Eylar; Carroll L. Torberson; Carlton Curtis; Mark A. Bilbrey; Olin R. Adams; Billy Arnold; Gary L. Arnold; Michael S. Backhaus; Bill G. Brewer; Price Brown; Richard A. Cloyed; John W. Curtis; Charles Day; Jesse Day; Stephen L. Ferguson; J. Michael Gibbs; Earl Hargis; Allen R. Kincaid; Francis J. Kuhlman; Larry L. Lautaret; Carl W. Laurent; David H. Lydick; Richard May; George F. Monday; Gerald L. Pope; Eric L. Rist; Philip A. Schmidt; Tumis Schurman; Clifford Sims; Dennis A. Sims; Harry R. Smith; Dale R. Spear; Edward L. Thibodeauz; Ronald L. Tottingham; Gary J. Uit De Flesch; Leslie A. Warren; Jerry West; Gary H. Williams; Samuel L. Woodruff; Dennis E. Fountain; Carl Spencer, Jr.; Harvey Schultz; Gary Lee Peterson; Ralph H. Liles; Michael McKinney; Alfred J. Riley; Dale K. Dykema; Brandon Dykema; Howard Quinlan; Robert Muncaster; Gary Lee Ashford; H. Lynn Bowen; Richard Gregory; Michael Wolfram; Herbert Lawson; Phillip Liles; and Jean Perry,

Appellants,

v.

Fred Tesch, in his official capacity as Sheriff of Cass County, Nebraska, and individually; Larry Shelbourn, in his official capacity as Chief Deputy Sheriff of Cass County, Nebraska, and individually; Raymond Syslo, in his official capacity as a Captain of the Nebraska State Patrol, and individually; Ronald D. Moravec, in his official capacity as Cass County Attorney; Paul L. Douglas, in his official capacity as Attorney General of Nebraska,

Appellees.

On Appeal from the United States District Court
for the District of Nebraska

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Submitted: February 17, 1984
Filed: June 29, 1984

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Before BRIGHT, ARNOLD, and FAGG, Circuit Judges.

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ARNOLD, Circuit Judge.

This case arises out of a longstanding dispute between the State of Nebraska and the Faith Baptist Church of Louisville, Nebraska, concerning the church's operation of a school without complying with Nebraska school laws. Litigation began when the state obtained an injunction in state court prohibiting the operation of the school. The Nebraska Supreme Court affirmed, holding that enforcement of the school laws did not violate the defendants' rights of freedom of religion. *State v. Faith Baptist Church,* 207 Neb. 802, 817, 301 N.W.2d 571, 580, *appeal dismissed for want of a substantial federal question,* 454 U.S. 803 (1981).

Following this decision, the state trial court found that the school was still being operated in violation of the injunction and entered an order which provided, in pertinent part,

> [A]s a means of enforcing its judgment [the Court] directs the Sheriff of Cass County to procure and install additional locks on each of the entrances to

> the church and school, it being one building, and to keep the building secured. The building is to be unlocked Saturday and Sunday and such other times as the building shall be used for the holding of church services.
>
> * * *
>
> The sheriff is further authorized to designate authority to his deputies or others for the patroling and or opening and closing of the building for the purposes indicated.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the defendants, Reverend Everett Sileven and Faith Baptist Church, are in contempt of the orders of this Court and that the Sheriff of Cass County shall forthwith secure the building by the placing of locks on each of the entrances to the church; the building to be opened on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services.

Order of September 11, 1981, Designated Record (D.R.) 44. The Reverend Mr. Sileven, pastor of the Church, and certain other defendants appealed this order to the Nebraska Supreme Court, but their appeal was dismissed for failure to file briefs. *Sileven v. Tesch*, 212 Neb. 880, 882, 326 N.W.2d 850, 852 (1982).

Meanwhile, the state court had told the sheriff not to enforce the September 11, 1981, order. But when the judge learned that the school had been reopened onec more, he ordered Mr. Sileven jailed for contempt and entered another order, which provided, in pertinent part,

> that the initial Order of September 11, 1981, directing the sheriff to secure the school building should be reinstated, directing the sheriff to secure the school building, the orders of this Court prohibiting the operation of a school for the teaching of non-religious

> subjects to be enforced. The building shall remain open on Wednesday evenings and throughout the weekend, the sheriff to withdraw security on Friday evenings at 5:00 p.m. and to enforce the order prohibiting the operation of a school on each Monday through Friday until further order of this Court.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the Order of this Court entered September 11, 1981, shall be reinstated, the Sheriff of Cass County and his enforcement personnel to enforce the Order of this Court prohibiting the operation of a non-approved school, the first enforcement thereof to be exercised Monday, October 18, 1982; it being the intent of the Court that the parents of children attending thereat shall have advance notice of the action taken by the Court.

Order of October 14, 1982, D.R. 65-66.

Shortly after 6:00 in the morning of October 18, 1982, the sheriff arrived at the church with fifteen carloads of deputies and state troopers. About 85 persons, including the plaintiffs here, were conducting a "prayer vigil," singing, preaching, reading the Bible, praying, and so forth, to protest the jailing of Mr. Sileven and the closing of the school. No school children were present, and no classes were being held. When the worshippers refused to leave, the law-enforcement officers picked them up, carried them out of the church, and padlocked the building.

The plaintiffs brought this suit under 42 U.S.C. § 1983 (1982) in the United States District Court for the District of Nebraska against the county, the state attorney general, the county attorney, and the sheriff and two other law-enforcement officers. The plaintiffs sought declaratory and injunctive relief and damages from the sheriff and

two other law-enforcement officers. The District Court dismissed the complaint, holding that the law-enforcement officers were absolutely immune from liability for damages and that the principles of *Younger v. Harris*, 401 U.S. 37 (1971), prevented the court from granting prospective relief. The plaintiffs appeal. We reverse.

## I. THE DAMAGES CLAIM

The District Court held that the state-court orders of September 11, 1981, and October 14, 1982, required the defendants' actions here. Thus, relying on the principle that "a quasi-judicial form of immunity extends to police and other court officers for purely ministerial acts where they do nothing other than perform court orders," D.R. 88, the court held the law-enforcement officers absolutely immune from liability for damages.[1]

The plaintiffs argue that the state-court orders did not authorize their eviction from a church service; that if they did, the orders would be unconstitutional; and that, even if they were executing a court order, the law-enforcement officers are not clothed with absolute immunity, but rather with qualified, good-faith immunity. Since we

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[1] The District Court also held that the defendants were immune because "[a]n injunction issued by a state court which had proper jurisdiction must be obeyed unless it is transparently invalid or based on frivolous pretenses. *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967)." D.R. 91. *Walker*, however, merely held that the parties against whom an injunction was issued could be held in contempt for defying it. It had nothing to do with a law-enforcement officer's duty to execute court orders. This is not a contempt proceeding against the people who were in the church when the sheriff arrived.

agree with the plaintiffs' first two propositions, we need not reach the third.[2]

A. The District Court's Analysis

The District Court interpreted the state-court orders to require the defendants to invade the church, remove the plaintiffs, and padlock the church:

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[2] The scope of the so-called quasi-judicial immunity afforded law-enforcement and other officers who merely execute court orders is unclear. The principle relied upon by the District Court was first enunciated in this Circuit in *Rhodes v. Houston*, 202 F.Supp. 624, 636 (D. Neb.), *aff'd per curiam*, 309 F.2d 959 (8th Cir. 1962), *cert. denied*, 372 U.S. 909 (1963), and has been repeated several times, see, e.g., *Tymiak v. Omodt*, 676 F.2d 306, 308 (8th Cir. 1982) (per curiam); *Guzman v. Western State Bank*, 516 F.2d 125, 132 (8th Cir. 1975); *Duba v. McIntyre*, 501 F.2d 590, 592 (8th Cir. 1974) (per curiam), *cert. denied*, 424 U.S. 975 (1976); *Hevelone v. Thomas*, 423 F.Supp. 7, 9 (D. Neb.) (alternative holding), *aff'd per curiam*, 546 F.2d 797 (8th Cir. 1976).

In *Sebastian v. United States*, 531 F.2d 900, 903 (8th Cir.) *cert. denied*, 429 U.S. 856 (1976), however, we held that deputy sheriffs who, pursuant to a court order, transported the plaintiff to a mental hospital were immune because they "acted at all times in good faith reliance on Arkansas law, without reason to believe that the appellant had been committed without notice and hearing." Finally, we have "held that court functionaries such as clerks are not clothed in [absolute] judicial immunity because their duties are ministerial, not discretionary, in nature," *McLallen v. Henderson*, 492 F.2d 1298, 1299 (8th Cir. 1974) (citation omitted), but rather are protected only by a qualified, good-faith immunity, *id.* at 1300. *But see Davis v. McAteer*, 431 F.2d 81, 82 (8th Cir. 1970) ("clerks of court are entitled to immunity the same as judges.")

The conflict in these authorities may be more apparent than real, particularly in light of the Supreme Court's recent revision of the definition of qualified immunity in *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982), but we need not resolve the problem here. We merely note that we have never held "that the unquestioning execution of a judicial directive may *never* provide a basis for liability against a state officer." *Sebastian, supra*, 531 F.2d at 903 n.6 (emphasis added).

> The court directed the defendants to padlock the entire building beginning October 18, and they did. Obviously, the defendants could not execute the injunction and padlock the building without removing all the people in the building . . . . Although the plaintiffs allege that the defendants' actions disrupted a church service, this does not abrogate the defendants' immunity. Judge Case's orders did not give the sheriff the authority to decide that the building should not be padlocked because it was being used for church services, nor did they say that the sheriff could choose to padlock the building if he believed that terminating the church service was necessary to prevent the operation of the school later in the day.

D.R. 90 (citation omitted). Although the District Court held that it had no authority to rule upon the constitutionality of the orders thus construed, because "the proper way to contest its constitutionality is to appeal it to the Supreme Court of Nebraska," ibid.,[3] it said,

> I do not doubt that the plaintiffs have a constitutional right to assemble in order to exercise their religion, but I am not at all sure that they had a right to assemble for religious purposes on the particular piece of private property that they chose to use.

D.R. 91.

---

[3] We dissagree. *District of Columbia Court of Appeals v. Feldman*, 103 S. Ct. 1303 (1983), which held that federal district courts do not have jurisdiction to review a state court's final judgment in a bar-admission matter, even if the state court's action is alleged to be unconstitutional, is not in point. The plaintiffs here are seeking damages from and equitable relief against law-enforcement officers. Moreover, most of the plaintiffs were not parties to the state-court proceedings and could not have sought review in the Nebraska Supreme Court. *Accord, In re Justices of the Supreme Court*, 695 F.2d 17, 26 (1st Cir. 1982).

The defendants, of course, urge us to uphold this analysis, and, at oral argument, elaborated on their interpretation of the state-court orders. They assert that the orders simply directed the sheriff to padlock the church building and to open it only on Saturday, Sunday, and Wednesday evenings. If the plaintiffs wished to worship in the church at another time, for example, on Good Friday, they would have to get permission from the state court. The defendants agree with the District Court that the orders, thus construed, are constitutional, because the plaintiffs would be free to worship in any other place at any other time they chose. To support this proposition, the defendants point out that the state court would be free to close the church for violations of a local fire code.

We reject these arguments. We hold that the state-court orders did not authorize the law-enforcement officers' action here. If the orders are ambiguous, they should be construed against the authority asserted by the state, because orders conferring such authority would be unconstitutional. Thus, there is no ground for the application of absolute "quasi-judicial immunity," though, as we make clear later, those defendants against whom damages are sought may have a defense of qualified immunity.

B. Interpretation Of The State-Court Orders

1.

We do not believe that, by directing that the church building be opened for religious services on Saturday, Sunday, and Wednesday evenings, the state court intended that the building be padlocked at all other times. Otherwise, the provision that "[t]he building is to be unlocked

Saturday and Sunday *and such other times as the building shall be used for the holding of church services,*" Order of September 11, 1981, D.R. 44 (emphasis added), would be superfluous. Moreover, the state court emphasized that its purpose was to secure the enforcement of its prior judgment. That judgment simply enjoined the church and certain individuals from operating the unapproved school. It said nothing about prohibiting worship on the premises. Finally, an order opening and closing the church according to a strict timetable, without accommodating the legitimate religious interests at stake, would be patently unconstitutional, and it is therefore our duty to construe the orders to avoid such a result.

The right to worship free from governmental interference lies at the heart of the First Amendment. It embraces not only the right to free exercise of religion, but also the right to freedom of expression. The defendants' argument that these rights would not be burdened by an order restricting the times that the plaintiffs could hold religious services in the church to weekends and Wednesday evenings, because the plaintiffs would be free to congregate and worship elsewhere, misses the mark: "'[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76-77 (1981) (quoting *Schneider v. State,* 308 U.S. 147, 163 (1939)). This principle applies with particular force to places, such as church buildings, which have a special spiritual significance to the persons who wish to worship there.

Of course, as we recently observed,

> [n]ot all burdens upon religion violate the free exercise clause. *See United States v. Lee*, 455 U.S. 252, 257-58, 102 S. Ct. 1051, 1055, 71 L.Ed.2d 127 (1981). The state may justify a limitation on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest. *Thomas v. Review Board*, [450 U.S. 707, 718, 101 S. Ct. 1425, 1432 (1980)]. In articulating the standard the state must meet, the Supreme Court has said that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, [406 U.S. 205, 215, 92 S. Ct. 1526, 1533 (1971)].

*Quaring v. Peterson*, 728 F.2d 1121, 1126 (8th Cir. 1984). We assume that the state's interest in preventing the operation of the unapproved church school is a compelling one. That interest does not in any event justify hauling worshippers out of an ongoing church service. The state could simply prevent school-age children from entering the building during school hours. Even if the state were to padlock the church and open it only when persons wished to enter in order to hold religious services, the burden on religious freedom would be less drastic than the action taken here. Thus, the state-court orders, if given the interpretation advanced by the defendants, would not be tailored narrowly enough to pass constitutional muster. Nor can the orders' validity be saved by construing them to give the state court, on application of the church, power to open the church doors on any given day. It is no part of the business of government in this country to decide when people may go to church. The First Amendment protects prayer at six o'clock on Monday morning just as much as at eleven o'clock on Sunday morning.

Because the state could achieve its objectives by less restrictive means, the defendants' analogy to fire-code vio-

lations is inappropriate. The state would not be able to fulfill its objective of protecting the public from the hazards presented by fire-code violations in any way other than closing the building; the building would not be safe for any purpose.

This distinction was drawn in a recent Eleventh Circuit case, *Grosz v. City of Miami Beach, Florida,* 721 F.2d 729 (11th Cir. 1983). In *Grosz* the plaintiffs, Orthodox Jews, held religious services at least twice daily in their home in violation of an ordinance which prohibited churches and synagogues in areas zoned for single-family residential use. The plaintiffs' neighbors were disturbed by chanting and singing, people asking for directions, and the occasionally large numbers of worshippers in attendance. The plaintiffs brought suit in federal court seeking to enjoin the city from prosecuting them for violating the zoning ordinance.

The Eleventh Circuit denied relief. Reasoning that, in free-exercise cases, government interests must be balanced against the impugned religious interest, the court observed that "where the government suffers no burden in changing its actions to accommodate religious onduct, any sectarian interest regardless of how lightly it weighs wins the balancing." *Id.* at 734. The court held, however, that the city could not achieve its objectives in any manner less burdensome to the plaintiffs' interests. *Id.* at 738. On the other hand, the plaintiffs could conduct services in other areas of the city in which religious institutions could lawfully operate, and one such area lay within four blocks of their home. Weighing these considerations, the court struck the balance in the city's favor.

Here, we need not consider whether alternative sites for worship would be open to the plaintiffs. Our inquiry ends with the holding that the state could achieve its objectives in a way less burdensome to the free exercise of religion.

C.

Since we hold that the state-court orders did not authorize the law-enforcement officers' actions here, those actions cannot be characterized as ministerial or merely in obedience to court directives. Thus, there is no basis for the application of absolute, quasi-judicial immunity. Further, our discussion in Part I.B., *supra,* demonstrates that the officers' conduct violated the plaintiffs' constitutional rights. Nonetheless, the officers may have a qualified immunity from liability for damages. On remand the District Court may, upon a proper motion, grant summary judgment in favor of the officers if it finds that the officers' conduct did not violate "clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).[4]

II. PROSPECTIVE RELIEF

In the course of reinstating the damages claim, we have held that the officers' action was unconstitutional. Since this amounts to a declaratory judgment and since

---

[4] The fact that the officers acted under color of the state-court orders will be relevant to this inquiry. There may be enough ambiguity in the orders to warrant a determination by the District Court that the defendants reasonably believed that the orders mandated the action taken here and that the action was constitutional because a judge had ordered it.

the damages claim is now back in the case, there is no basis for abstention on the claims for prospective relief. On remand the District Court should enter a declaratory judgment in favor of the plaintiffs and address the issue of the defendants' qualified immunity. The plaintiffs indicated at oral argument that injunctive relief might not be necessary, and we leave that determination to the District Court's discretion.

Accordingly, the judgment of the District Court is reversed and the cause remanded for proceedings consistent with this opinion.

FAGG, Circuit Judge, dissenting.

I respectfully dissent. In my view, the district court's dismissal of plaintiffs' damage claims against the law enforcement officers was proper.

I take issue with the court's conclusion that the law enforcement officers were not acting in obedience with the orders issued by the state judge. In the September 11, 1981 order the judge issued the following command:

> IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED * * * that the Sheriff * * * shall forthwith secure the building by the placing of locks on each of the entrances to the church; the building to be open on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services.

On October 14, 1982, the state judge reinstated his prior order and gave the following command to the Sheriff:

> IT IS ORDERED, ADJUDGED AND CONSIDERED * * * that the Order of this Court entered September 11, 1982 shall be reinstated, * * * the first enforcement thereof to be exercised on Monday, October 18, 1982 * * *.

When these commands are read in a straightforward fashion, the officers were faced with an unpopular but clearly stated assignment. They were charged by a state judge with the responsibility to close and lock a church building on October 18, 1982, and to reopen it during specified periods.

When the state judge finally reached the point in his orders of directing the sheriff to take action, he did so with explicit, clearly stated commands. In arriving at its determination that the officers' actions were at variance with the orders, the court has failed to give the judge's clearly stated commands their proper weight. Instead, the court has directed its focus upon a pre-order recital that suggested generally that the church was to be open at such times as church services were being held. The state judge, however, translated this general statement into a very specific judicial command to the sheriff; that the building be locked at all times except Saturday, Sunday, and Wednesday evenings. The specific command did not leave the sheriff with discretion to permit religious services at any other times. The directions that were actually given to the sheriff clearly refute the court's statement that "[w]e do not believe that by directing that the church building be open for religious services on Saturday, Sunday, and Wednesday evening, the state court intended that the building be padlocked at other times." *Ante* at 8. Simply stated, the court is not in a position to rely upon a generalized pre-order recital for the purpose of construing the orders to the officers' detriment.

It is easy in hindsight to suggest that the officers would have been well advised to wait until the prayer vigil

was over until locking the building. Nevertheless, the officers had to execute orders they did not draft and they had to carry out commands which they did not issue. It is too much to expect, as the court apparently does, that the officers employ legal canons of construction to interpret the orders issued by a state court judge. From the officers' standpoint, the judge's underlying intent and purpose were not their concern; nor was it of any consequence to the officers that judicial scholarship might be required subsequently to harmonize a generalized recital that otherwise "would be superfluous" or that the order would be construed to avoid an unconstitutional result. *Ante* at 8. Instead, the officers looked to the specific judicial command to "forthwith secure the building" and carried it out to the best of their ability. I am convinced that in locking the church building on October 18, 1982, the officers were acting in accordance with the specific judicial commands of the state court.

Thus, I would reach the question of what type of immunity from damages liability is to be accorded law enforcement officers that are acting pursuant to court orders. Judges acting within the scope of their authority have been accorded absolute immunity from suits. *Stump v. Sparkman,* 435 U.S. 349 (1978). Absolute immunity has also been extended to prosecutors for their decision to prosecute and their handling of the prosecution on the theory that these activities are intimately associated with the judicial function. *Imbler v. Pachtman,* 424 U.S. 409 (1976). The same protection has been extended to probation officers when preparing and submitting presentence reports because the officer is performing a judicially related function. *Spaulding v. Nielsen,* 599 F.2d 728 (5th

Cir. 1979); *Burkes v. Callion,* 433 F.2d 318 (9th Cir. 1970), *cert. denied,* 403 U.S. 908 (1971). For the same reasons that absolute immunity has been extended to prosecutors and probation officers participating in the presentence report process, I believe that law enforcement officers are entitled to absolute immunity when they are carrying out the orders of a court. *See Tymiak v. Omodt,* 676 F.2d 306, 308 (8th Cir. 1982); *Hevelone v. Thomas,* 423 F. Supp. 7, 9 (D. Neb.), *aff'd,* 546 F.2d 797 (8th Cir. 1976).

Courts not only expect but are entitled to insist upon an immediate, unquestioning enforcement of the court's directives. From the officers' standpoint, they must stand ready unhesitatingly to do what the judge tells them must be done. It would be anomalous for the court to punish obedient law enforcement officers by exposing them to civil damage liability based upon the shortcomings of orders drafted by absolutely immunized state judges. Furthermore, it would be unworkable for the officers to await interpretations from federal appellate judges rendered long after the orders were executed to learn whether they will be civilly liable for performing an assigned duty. In our judicial system, law enforcement officers are not privy to the judicial intent or purpose upon which orders are formulated; they are not allowed to reshape the judicial command; they are not authorized to interpret the order and then implement it in a fashion which coincides with their perception. It is not the officers' role to question whether an order is the correct one under the law; instead, their role is to execute the order as it is given.

In my view, law enforcement officers must be afforded absolute immunity from liability for money damages when

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they are executing court orders. I believe the officers' function in executing court orders is intimately and vitally associated with the judicial function. Courts have understandably been cautious in extending the protection of absolute immunity, and public officials "who seek absolute exemption from personal liability from unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *See Butz v. Economou,* 438 U.S. 478, 506 (1978). I believe the law enforcement officers have carried their burden in this case.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

## APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 83-2191

Robert E. McCurry, et al,

Appellants,

vs.

Fred Tesch, et al,

Appellees.

Appeal from the United States District Court
for the District of Nebraska

O R D E R

At the direction of the panel, the word "patently" on the next to the last line of P. 8 of the slip opinion by this Court on June 29, 1984 is hereby stricken.

August 24, 1984

## APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 83-2191-NE.

ROBERT E. McCURRY, ET AL.,

Appellants,

VS.

FRED TESCH, ETC., ET AL.,

Appellees.

Appeal from the United States District Court
for the District of Nebraska

The petition of appellees for rehearing en banc is denied for the reason that the majority of the active judges on the court have failed to vote in favor of the petition.

Judges Ross, John R. Gibson, Fagg and Bowman would have granted the petition.

Petition for rehearing by the panel is also denied.

August 24, 1984

## APPENDIX I

Constitution, Article III (in part):

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviors, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the Government for a redress of grievances.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Office-Supreme Court, U.S.
FILED
JAN 11 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-897

IN THE
# Supreme Court of the United States
October Term, 1984

FRED TESCH, *et al.*,
*Petitioners,*

vs.

ROBERT E. McCURRY, *et al.*,
*Respondents.*

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Respondents do not believe that any questions raised by petitioners merit review by this Court. In compliance with Rule 34.1(a) and 22.1, the following would be a more accurate statement of the questions presented for review:

1. Did the Court of Appeals err by holding that a Nebraska state court order directing the closure of a Christian school, did not authorize a police raid on a church worship service?

2. Are law enforcement officers, who are not acting pursuant to a court order, immune from suit for civil rights violations under 42 U.S.C. 1983 when they raid a church worship service, forcibly evict worshipers and padlock the church?

Other issues raised by petitioners are discussed in argument.

## PARTIES

The petitioners correctly list the parties in their Petition for Certiorari at ii. Counsel for Respondents represents all of the respondents.

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IN THE

# Supreme Court of the United States

October Term, 1984

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No. 84-897

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FRED TESCH, *et al.*,
*Petitioners,*

vs.

ROBERT E. McCURRY, *et al.*,
*Respondents.*

---

## BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

---

## STATEMENT OF THE CASE

On Monday morning October 18, 1982, petitioners conducted an early morning raid on a church worship service at Faith Baptist Church in Louisville, Nebraska. Respondents were engaged in prayer, singing of hymns, preaching and worship.

Petitioners Tesch, Shelbourn, and Syslo claimed to be enforcing a court order directing the closure of a Christian school. The order directed the padlocking of the building with the explicit direction that the sheriff was to "prohibit the operation of a non-approved school." Pet. for Cert. at 4a. But the state judge had expressly directed the sheriff to

ensure that the building was open for worship services at certain designated times and at "such other times as the building shall be used for the holding of church services." Appendix B at 6a.

There is no claim by petitioners that anything other than a church service was in progress at the time of their predawn raid.

Petitioners and their deputies and state troopers forcibly evicted all of the worshipers and padlocked the building.

On December 13, 1982, respondents filed this action in the U.S. District Court for the District of Nebraska. The complaint sought damages against the police officer defendants and declaratory and injunctive relief against the police officers and defendants Moravec and Douglas, the County Prosecutor and State Attorney General, respectively.

The District Court granted petitioners' motion to dismiss on July 28, 1983. The central ruling was that the petitioners were doing nothing more than required of them by the state court orders when they raided the church service. Since they were enforcing a state court order, the District Court held, the law enforcement officers were entitled to absolute immunity from suit under 42 U.S.C. 1983. The claim for prospective equitable relief was denied under the doctrine of abstention under *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The Eighth Circuit Court of Appeals reversed the District Court on June 29, 1984. The Court of Appeals held that the state court orders did not direct the law enforcement officers to raid the church service and therefore reliance on the doctrine of absolute quasi-judicial immunity was misplaced. The Court held that the raid on the

church service violated the respondents' rights to free exercise of religion under the First Amendment.

The Court of Appeals ruled further that since the state court did not order the raid on the church service, *Younger* v. *Harris, supra,* did not require abstention since there was no interference in an ongoing state proceeding.

## SUMMARY OF ARGUMENT

1. Petitioners' case is founded upon a misreading of the Court of Appeals decision. They claim that the Court of Appeals reviewed the constitutionality of the state court orders and found them wanting. In reality, the Court of Appeals did nothing more than rule that the state court orders did not authorize the raid on the church service. It was the petitioners' interpretation of those orders which the Court of Appeals said would be unconstitutional. Therefore, petitioners' arguments concerning improper review of a state court order are based upon a false premise.

2. The Court of Appeals clearly made a correct interpretation of the state court orders which directed the sheriff to open and close the church for the purpose of closing the school while permitting church services at any time.

3. The petitioners claim that the Court of Appeals has "*sub silento*" permitted respondents to sue the prosecuting attorney and attorney general for damages. The clear record is that we have only sued the attorney defendants for declaratory and injunctive relief.

4. Petitioners raise a confused question for the first time in this court that there is not a "case of controversy" presented by this case. The claim for damages obviously

satisfies the Article III requirement and the equitable relief was properly granted by the Court of Appeals.

5. The Court of Appeals did not err by granting a declaratory judgment in favor of respondents. There are no material facts in dispute and there were no procedural irregularities justifying a reversal.

6. The District Court dismissed Cass County as a defendant for failure to plead more than the county's name. The Court of Appeals did not address this issue, but simply remanded for further proceedings consistent with their opinion. At most, respondents have gained an opportunity to amend their pleadings as to the county.

## I. Petitioners Patently Mischaracterize the Decision of the Court of Appeals.

The linchpin of petitioners' argument is a deliberate and repeated mischaracterization of the opinion of the Eighth Circuit Court of Appeals in this case. The petitioners assert, for example:

> the Court of Appeals absolutely lacked jurisdiction to review and determine the constitutionality of that order. [The state court order of October 14, 1982.] Only this Court could review that order and then only after it had been reviewed by the Nebraska Supreme Court. . . . Thus, the Court of Appeals erred when it undertook to review the state district court's order of October 14, 1982.
>
> —Petition for Certiorari at 26.[1]

The Court of Appeals did not "review" the state court orders in the sense that term is used by petitioners. Neither

[1]Hereinafter referred to as Pet. for Cert.

did it determine the constitutionality of the state court's order. The Court of Appeals did nothing more than rule that the language of the state court order did not authorize a police raid on a church worship service. The Court of Appeals ruled that *petitioners' interpretation* of the state court order would render such order unconstitutional and therefore rejected their interpretation. Rejecting the petitioners' interpretation of an order on constitutional grounds is not the same as a direct "review" of the state court order. The Court of Appeals held that the petitioners' *actions* were unconstitutional, it did not hold that the state court proceedings were unconstitutional.

The only reason that the state court orders were even before the federal courts is because the *petitioners* placed them in issue. Neither the original nor amended complaint in this case ever alleged that the state court orders were unconstitutional. These complaints simply alleged that the petitioners violated the respondents' civil rights by making a police raid on a church worship service. The petitioners then raised the state court orders as an affirmative defense. They argued that the police officers were merely carrying out a court order and were therefore clothed with quasi-judicial immunity.

The question that was then before the federal courts as a result of the petitioners' own pleadings was: Did the state court orders authorize the police raid on a church worship service? The petitioners advanced one line of interpretation. The respondents countered with another interpretation of these orders, arguing that the orders did not authorize the police raid and arguing further that the interpretation advanced by the respondents would result in an unconstitutional interpretation. Therefore, respondents argued, faced with two conflicting interpretations, the duty of the federal courts was to construe the state court

orders in such a way as to avoid an unconstitutional reading of the state court orders.

The Court of Appeals made its position clear when it said, concerning the petitioners' arguments:

> We rejected these arguments. We hold that the state-court orders did not authorize the law-enforcement officers' action here. If the orders are ambiguous, they should be construed against the authority asserted by the state, because orders conferring such authority would be unconstitutional. Thus, there is no ground for the application of absolute "quasi-judicial immunity" . . . .
>
> —Pet. for Cert., Appendix 31a.

Thus the characterization by petitioners that the decision of the Court of Appeals is a bizarre, novel intrusion of the federal judiciary into the state judicial domain, is patently false.

The Court of Appeals did not invalidate a state court order. The Court of Appeals did not enjoin a state court proceeding. The Court of Appeals did not permit a civil rights suit against police officers who were merely enforcing a court order.

Rather, the Court of Appeals made an unsurprising ruling that police officers who violate the civil rights of citizens are subject to suit under 42 U.S.C. 1983 if the police officers' actions are not authorized by the court order they are purportedly enforcing.

This Court need not review such a ruling. It is clearly a correct statement of the law. See, e.g., *United States* v. *Murrie,* 536 F.2d 695 (6th Cir. 1976).

## II. The Court of Appeals Made the Correct Interpretation of the State Court Orders.

As a result of the petitioners' mischaracterization of the decision of the Court of Appeals, they have consequently misstated the issues which are potentially before this Court.

The central issue is nothing more than whether or not the Court of Appeals correctly interpreted the state court orders. This is hardly a novel or important federal question. No new principles of interpretation are at stake. This Court has previously established clear rules that state court orders which affect First Amendment freedoms must be strictly construed in favor of those freedoms. *Carroll* v. *President and Commissioners of Princess Anne County,* 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). It is beyond dispute that orders must be construed in accordance with the plain language of such orders. Finally, this Court has also established the rule that if court orders are capable of two interpretations, one of which would lead to an unconstitutional result, the constitutional result must be chosen. *Regional Rail Reorganization Case,* 419 U.S. 102, 95 SCt. 335, 42 L.Ed. 2d 320 (1974); *Graham* v. *Richardson,* 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971).

By application of these three rules of construction, it is beyond legitimate dispute that the Court of Appeals made the correct interpretation of the state court order.

The state court order of October 14, 1982's, operative language provided:

> IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the Order of this Court entered September 11, 1981, shall be reinstated, the Sheriff of Cass County

> and his enforcement personnel to enforce the Order of this Court prohibiting the operation of a non-approved school, the first enforcement thereof to be exercised Monday, October 18, 1982; it being the intent of the Court that the parents of children attending thereat shall have advance notice of the action taken by the Court.
>
> —Pet. for Cert, App. at 4a.

There are three specific items which were established by this order. First, the operative effect was to reinstate the prior order of September 11, 1981. Therefore, it is both appropriate and necessary to consider, as the Court of Appeals did, the language of the September 11, 1981, order to interpret the Court's instructions to the sheriff. Second, the sheriff was ordered to "prohibit. . . the operation of a non-approved school." Nothing in this order directs or requires raids on worship services. Third, it was the Court's intention that the parents of the children would receive notice. This aspect of the order does not come into play in this case.

The order of September 11, 1982, provided two crucial directions to the sheriff to guide his actions at the church. First the state judge directed:

> The building is to be unlocked Saturday and Sunday and *such other times as the building shall be used for the holding of church services.* [Emphasis added.]
>
> Appendix B, at 6a.

The state judge also direct the sheriff with the following language as to the purposes for which he was to open and close the church:

> The sheriff is further authorized to designate [sic] authority to his deputies or other for the patrolling and or *opening and closing of the*

*building for the purposes indicated.* [Emphasis added.]
Appendix B at 6a.

The petitioner complain that they should have been allowed to have the judge testify as to his intent[2], apparently so he could clear up the confusion. Yet at another point petitioners accuse the Court of Appeals of failing to follow the clear intent of the state court as expressed in its orders.[3]

It seems apparent that the petitioners have difficulty in facing the reality of the plain language above-quoted. There is no question of lack of clarity. The church was to be "opened and closed for the purposes indicated." The church was to be closed when it was used as an uncertified school. Both orders specificially directed that the church was to be opened when used for religious worship. If the sheriff was required to adhere to a strict time-table as the petitioners argue, then the order would have read: "the church is to be opened and closed at the *times* indicated."

The September 11, 1981 order's language that the building was to be unlocked at "such other times as the building shall be used for the holding of church services" is unambiguous.

The petitioners argue that the order of October 20, 1982, is evidence that their interpretation of the prior orders was the correct one. It should be noted that the Court of Appeals never received the benefit of this argument from the petitioners. They raise it here for the first time. Nonetheless, the fact that the state court opened the church when it became apparent that there was going to be a prayer meeting cuts against petitioners.

[2]See Pet. for Cert. at 27.

[3]See Pet. for Cert. at 26.

This case arises because the sheriff conducted a raid on a church service on a Monday morning. He argues that this was what the schedule demanded. He argues that the state judge intended that the time schedule be strictly adhered to. Then, in an seeming inconsistency, he argues that the fact that the judge permitted a prayer meeting on Wednesday afternoon proves his point.

If the schedule was to control, why did the judge permit an exception? The October 20 order proves, it would seem to us, that the judge wanted to permit religious services at any time, it being his sole intent to close the school. The petitioners are not clear in their reasoning on this point. If anything, they have raised a new argument which proves that the judge would have precluded the sheriff from raiding the Monday worship service if the question had been directly presented to him.

There can be no question that there is a constitutional right to worship in church protected by the First Amendment. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 109, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Neither is there any question that it is unconstitutional to impose a prior restraint on religion. *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). If a church is required to seek a court's permission to hold a midweek service this is clearly an unconstitutional prior restraint. Yet, the petitioners unashamedly asserted such a position below, including admissions in oral argument that they believed that it was appropriate for a church to be required to get a judge's permission to hold a Good Friday service.[4]

The Court of Appeals correctly interpreted the state court orders. If there was any doubt, the Eighth Circuit

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[4]See Pet. for Cert., Appendix F at 31a.

correctly gave the benefit of such doubt to those asserting the First Amendment freedom.

We would respectfully suggest that although the fact that a sheriff raided a church service and forcibly evicted worshipers is a novel factual situation, at least in the United States, there is nothing in the interpretation of the state court orders which is either erroneous or which raises the kind of important and novel federal questions which this Court demands in granting petitions for certiorari.

## III. Petitioners' Claim that the Court of Appeals' Decision Permits Respondents to Seek Damages Against the Prosectuor and State Attorney is False and Frivolous.

In the first amended complaint the first paragraph of the prayer for relief (which is the only paragraph addressing the issue of money damages), the following is sought:

> For damages as alleged above for violation of their rights under the Constitution of the United States in such amount as shall be proven at trial, but not less than one million dollars . . . for each of said plaintiffs, *against defendants TESCH, SHELBOURN and SYSLO.* [Emphasis supplied.]

All other requests for relief are sought against "all defendants."

Tesch, Shelbourn, and Syslo are the law enforcement officers. Douglas and Moravec are the State Attorney General and the County Prosecutor, respectively. The complaint makes it absolutely clear that we were not seeking damages against the prosecuting attorney or the attorney general. In our briefs at all levels, we have

repeatedly acknowledged this fact and have never changed our position.[5]

Therefore, it appears to us that when petitioners allege that the Court of Appeals has "apparently reversed *sub silento* the District Court's dismissal of the claims for damages, declaratory and injunctive relief against Douglas and Moravec"[6] the petitioners are pursuing ghosts. We are *not* suing these attorney defendants for damages. We never have sued them for damages. The Court of Appeals has done nothing to the contrary. How can the Eighth Circuit *sub silento* reverse the District Court on an issue we have not even raised?

The law is clear that judges and prosecutors may be sued under 42 U.S.C. 1983 for declaratory and injunctive relief. *Pulliam* v. *Allen,* ____ U.S. ____, 104 S.Ct. ____, 80 L.Ed.2d 565 (1984); *Gerstein* v. *Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), *Supreme Court of Virginia* v. *Consumers Union,* 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980). That is all we have done.

The petitioners appear to be grasping at non-existent straws to find some basis for review.

## IV. Petitioners Raise for the First Time in This Court Confused Issues Concerning a Supposed Lack of Case and Controversy.

First of all, it should be noted that there can be no legitimate question raised about the existence of a "case or controversy" as it pertains to the damages aspect of this case. The respondents have sued for damages for civil

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[5]See, e.g., petitioners' acknowledgement of this fact in our brief before the federal District Court, Pet. for Cert. at 19.

[6]Pet. for Cert. at 19-20.

rights violations when they were forcibly removed from a church worship service on October 18, 1982. There is nothing abstract about such a claim. It is a justiciable case and controversy and it is clear that those who were evicted have standing to press such a suit.

The petitioners argue that we have failed to allege the prospect of any likelihood of future raids or padlockings. The first amended complaint alleged the following:

> 87. Defendant TESCH has made statement in the press and otherwise that it is his desire that the church be padlocked permanently. Plaintiffs allege on information and belief that there is a substantial threat of unlawful violence and force by defendant TESCH and those acting under his direction and control, including but not limited to: tear gassing of worshipers and other violent alternatives. Plaintiffs believe that said defendant will carry out such threats unless he is restrained by the Court from doing so.
>
> 88. Plaintiffs that defendants will continue to perform acts in violation of plaintiffs' constitutional rights unless and until a permanent injunction is issued restraining them from padlocking the church and from otherwise interfering with the constitutional rights of plaintiffs and other worshipers.

The whole line of argument that the October 20, 1982 order, which terminated the padlocking, results in a lack of case or controversy is raised by petitioners for the first time in this Court. Suffice it to say that the first padlocking order was made on September 11, 1981. It was reinstated on October 14, 1982. There is nothing which will prevent the petitioners from seeking its renewal once again. If they obtain another order to close the school,

they would again claim the right to raid another worship service to effectuate that order, unless, of course, the federal courts prohibit their misconduct allegedly required by the state court orders.

The only arguable point which petitioners raise relative to the issue of "case or controversy" is that Nebraska has passed a new law regarding private schools. The petitioners note that the Nebraska Legislature amended the private school law that was the genesis of this entire legal controversy. Therefore, although not stated in this way by petitioners, they raise a potential question of mootness. However, petitioners failed to inform this Court that this law was passed subsequently to oral argument and became effective subsequent to the decision of the Court of Appeals.[7] Petitioners never raised this mootness argument in either court below, nor did they raise this issue in their motion for rehearing before the Eighth Circuit.

Interestingly, or perhaps ominously, the petitioners argue, at another point in their petition that enforcement proceedings are still looming in the state courts despite this new law.[8] Petitioners claim that these ongoing proceedings require the federal courts to abstain from issuing declaratory or injunctive relief. If there is a case or controversy still alive which might give rise to the abstention doctrine, how then can there be no case or controversy for the purposes of justiciability or mootness?

As long as petitioners claim the right to enforce their prior decrees, and as long as they claim that their raid on

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[7]This law, L.B. 928, now Neb. Rev. Stat. 79-1701 (Supp. 1984) was passed on April 5, 1984 and became effective on July 10, 1984. This case was argued on February 17, 1984 and decided on June 29, 1984.

[8]Pet. for Cert. at 22.

the church was legally justified, this case is alive.[9]

In any event this case was not moot at the time the Court of Appeals entered its decision. The damages portion of the case is clearly justiciable and has not become

## V. The Court of Appeals Was Justified in Issuing A Declaratory Judgment Against Petitioners.

The petitioners moved for judgment of dismissal on the pleadings in the District Court. They introduced affidavits in support of their motions. They clearly relied on the state court orders in support of their motions. They even annexed newspaper articles to their motions and relied on statements therein for proof of certain "facts."

It is axiomatic that if a party moves for judgment on the pleadings, and then presents materials outside the pleadings the motion may be properly considered a motion for summary judgment. *Carter* v. *Stanton,* 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). Further, it is clear that one moving for summary judgment may have summary judgment entered against him even if there is no cross motion, so long as there is no triable issue of fact. *Proctor & Gamble Ind. Union* v. *Proctor & Gamble Manufacturing*

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[9]The citation of *In re Liles,* 217 Neb. 414, 349 N.W.2d 377 (1984) by petitioners as an example of pending enforcement proceedings is curious. Lead counsel for both parties in this case were also lead counsel in *In re Liles.* That case involved the jailing of seven fathers of children who attended Faith Baptist School when they invoked the Fifth Amendment in a subsequent contempt proceeding. These fathers were released from jail on February 23, 1984 after spending 93 days in jail for invoking the Fifth Amendment. The *Liles* case may shock the conscience, but it is not proof of the proposition that there are ongoing contempt proceedings that are subsequent to the new law. Counsel is aware of such proceedings against others, but not against those involved in the *Liles* case.

*Co.*, 312 F.2d 181, 190 (2d Cir. 1962). All of the material facts of this case are beyond dispute. The fact of the raid, the content of the court orders, the identity and acts of the parties are conceded by both sides.

Petitioners' assertion that the Court of Appeals entry of a declaratory judgment was a novel unwarranted move justifying the exercise of this Court's supervisory powers[10] is frivolous. The Court of Appeals has done nothing more than enter a summary judgment against the party seeking such a judgment.

Petitioners cry "foul" pointing to five items which they claim were included in the opinion of the Court of Appeals which cannot be found in the designated record.[11] Petitioners argue that the failure to include these facts in the designated record require the judgment of the Court of Appeals to be vacated.[12]

Petitioners correctly assert that these facts can be found in our brief in the Court of Appeals.[13] However, petitioners fail to raise any issue at the appellate level over the inclusion of these facts in that brief. Once again, they raise this issue for the first time in this Court.

Before briefly reviewing each of the supposed omissions we note that all of these facts were in the record in the District Court. Contrary to petitioners' assertion, most of them were in the designated record on appeal as we will demonstrate. One affidavit which was before the District Court contains the remainder of the facts in question. Had the petitioners raised this issue in the Court of Appeals, we

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[10]Pet. for Cert. at i, Question 6.

[11]See Pet. for Cert. at 28.

[12]Pet. for Cert. at 28-29.

[13]Pet. for Cert. at 29.

would have had an opportunity to move to amend the designated record to add the affidavit. Finally, none of the facts are crucial to the judgment of the Court of Appeals.

The first of these disputed items concerns the statement that "the sheriff arrived at the building 'with fifteen carloads of desputies and state troopers." In their brief in the Court of Appeals, the petitioners admit that "the Cass County Sheriff and his deputies, along with Nebraska State Patrol troopers . . . arrived at the Faith Christian School . . ."[14] The first amended complaint which was part of the designated record, alleged that "numerous uniformed and armed Cass County deputy sheriffs and troopers of the Nebraska State Patrol" conducted the raid on the church. The only issue which is even possibly in dispute is whether or not there were actually fifteen carloads of deputies and troopers. This fact is found in the affidavit of Lester Spear which was before the District Court. This affidavit is attached as Appendix A.

The difference between "numerous" law enforcement officers and "fifteen carloads" of law enforcement officers is hardly the kind of issue which could result in the reversal of a summary judgment, not to mention the fact it is not the kind of trivia this Court usually deals with.

The second of these "facts" was the statement that the "plaintiffs 'were conducting a prayer vigil.' "[15] This fact was before the Court of Appeals in paragraph 77 of the first amended complaint which was part of the appellate designated record.

Likewise the third "fact" that "the plaintiffs were 'singing, preaching, reading the Bible, praying, and so forth, to

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[14]Brief of Appellees at 8.

[15]Pet. for Cert. at 28.

protest the jailing of Mr. Sileven and the closing of the school' "[16] is found in paragraph 77 of the first amended complaint.

The fourth fact is "no school children were present." This fact is found in the affidavit of Dale Spear, paragraph 7. Likewise the fifth fact "no classes were being held" is found in the same paragraph of the Spear affidavit.

There is no real dispute as to these matters. Petitioners have shown nothing in the record to the contrary. At most they have shown that through oversight one affidavit was neglected to be placed in the designated record on appeal. Given the fact that this is raised for the first time in this Court, it does not give rise to a question of the nature or importance which invokes this Court's "supervisory jurisdiction."

Petitioners are asking this Court to become embroiled in minutia when it raises such minor matters in this Court.

## VI. There is no Legitimate Argument Concerning the Presence of Cass County as a Defendant.

Respondents concede that the first amended complaint alleges nothing more than the name of Cass County. We will further concede that this is insufficient to hold Cass County liable in any portion of this case.

However, this still gives no basis for review by this Court of the decision of the Court of Appeals.

The Court of Appeals simply did not address the issue of Cass County as a defendant. It remanded the case to the

[16]Pet. for Cert. at 28.

District Court for proceedings consistent with the Court's decision. There would be nothing inconsistent with that opinion if the District Court renewed its dismissal of Cass County as a party.

The net result of the Court of Appeals decision does nothing more than give the respondents an opportunity to amend its pleadings as to Cass County. Once this case is remanded to the District Court for trial, we will move to amend the pleadings against Cass County to conform to the standard of this Court in *Monell* v. *New York City Dept. of Soc. Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 621 (1978), which establishes the principle of municipal liability under 42 U.S.C. 1983. If the District Court determines our pleading to be insufficient under *Monell,* then it will not be inconsistent with the Court of Appeals decision to dismiss at that point.

This issue is not of major significance. It does not justify review in this court. We were simply cut off from correcting an obvious deficiency in our complaint by the granting of the motion to dismiss on other, more substantial grounds. Undoubtedly the District Court would have given us an opportunity to amend our pleading if this were the only problem it saw in our case.

## CONCLUSION

Respondents respectfully suggest that no issues are present in this case which merit review by this Court. The court of appeals has committed no error and no substantial federal questions are raised. We urge the denial of the Petition for a Writ of Certiorari.

Respectfully submitted,

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JORDAN W. LORENCE
Staff Attorney

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Counsel for Respondents

January 11, 1985

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| ROBERT E. McCURRY, et al., | ) | Civil |
| | ) | No. 82-L-659 |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | AFFIDAVIT |
| | ) | |
| FRED TESCH, et al., | ) | |
| | ) | |
| Defendants. | ) | |

STATE OF NEBRASKA )
) ss.
COUNTY OF LANCATER )

Comes now Rev. Dale Lester Spear, after being first duly sworn, and deposes and says the following:

1. My name is Dale Lester Spear, and I reside at 2916 Randolph Street, Lincoln, Nebraska 68510. On the morning of October 18, 1982, at 6:00 a.m. and all other times material to this affidavit, I was present at the Faith Baptist Church in Louisville, Cass County, Nebraska.

2. At about 6:00 o'clock a.m. on that morning, I was gathered together with others inside the church sanctuary or area normally used by the church for conducting worship services with approximately eighty or more other people. We were all engaged in a religious service, praying to God, singing and reading the Bible. We were praying for, among other things, Reverend Everett Sileven, pastor of the Faith Baptist Church, and his release from jail. We

were also praying for God to intervene and prevent the school operated by the Faith Baptist Church from being closed by authorities of the state of Nebraska, and to prevent the closing of the Faith Baptist Church.

3. During the course of the services various members of those assembled gave sermons or exhortations which included Biblical preachings and exhortations.

4. Sometime after 6:00 o'clock a.m., but before 6:30 a.m., the church was entered by numerous uniformed Cass County Deputy Sheriffs and members of the Nebraska State Patrol. To the best of my knowledge none of these officers who entered requested or received permission from anyone present to do so.

5. The law enforcement officers completely disrupted the religious service, terminating it by forcibly removing from the church several people who refused to move of their own accord. I was among those individuals forcibly removed because I refused to move of my own accord.

6. When I was taken out of the church by the law enforcement officers, I was placed on the grass lawn immediately adjacent to the church building. I personally observed one or more of the law enforcement officers who were present place a chain and padlock upon the doors of the church. This prohibited us from re-entering the sanctuary to continue our religious service and protest against the actions of the state of Nebraska and its representatives in connection with the operation of the school at the Faith Baptist Church in Louisville, Nebraska, and in terminating our worship and protest service.

7. Once outside the church, I noted what I would estimate to be at least fifteen cars bearing the markings of either the Nebraska State Patrol or the Cass County

Sheriff's Department. During the course of the religious service in which I participated and afterward, there were, to the best of my knowledge, no children present in the Faith Baptist Church building, and preparations for classes were not, to my knowledge, underway.

8. Many of the individuals who were removed from the sanctuary of the Faith Baptist Church refused to do so of their own acccord and were consequently carried or dragged out and placed upon the sidewalk or adjacent areas by the law enforcement officers. I was personally removed by two Nebraska State Patrol officers because I refused to move of my own accord.

9. I am personally afraid and wary to re-enter the Faith Baptist Church at any time for the reason that I may once again be confronted with the humility [sic] or degradation of being forcibly removed by law enforcement officers.

10. The underlying situation remains at loggerheads. The sheriff and the prosecuting attorney have been continuing to maintain surveillance of the church building and have accused the church of again illegally operating the school. The sheriff has personally entered the church on the alleged premise of checking on the operation of the school. The worshipers at the church fear that such searches will again result in attempts to padlock the church or otherwise curtail worship services under the guise of closing the school.

Further affiant saith not.

Dale L. Spear

Subscribed and sworn to before me this 12th day of March, 1983.

/s/ William J. Morris
Notary Public
General Notary - State of Nebraska
WILLIAM J. MORRIS
My Comm. Exp. July 27, 1983

## APPENDIX B

IN THE DISTRICT COURT OF
CASS COUNTY, NEBRASKA

| | | |
|---|---|---|
| STATE OF NEBRASKA, ex rel. PAUL L. DOUGLAS, Nebraska Attorney General and RONALD D. MORAVEC, Cass County Attorney, | ) | |
| Plaintiffs, | ) | DOCKET 24 PAGE 138 |
| -vs- | ) | |
| FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, A Corporation; FAITH CHRISTIAN SCHOOL, Louisville, Nebraska; EVERETT SILEVEN: EDGAR GILBERT; TRESSIE SILEVEN; MARTHA GILBERT; HELEN ALDRICH; RALPH LILES: KENNETH HEARD; DAVE CARLSON and WALTER PETERSON, | ) | ORDER |
| Defendants. | ) | |

Now on this 11th day of September, 1981, the above entitled is before the Court for a further determination of compliance by the defendants with the orders of this Court in the continuation of the Faith Christian School at Louisville, Nebraska.

For the purposes of this hearing, the plaintiff appeared by Ronald D. Moravec, Cass County Attorney, the defendant appearing personally with his counsel, Richard Swenson of Omaha, Nebraska, and Charles Craze of Cleveland, Ohio. Four affidavits were offered and admitted in evidence together with a stipulation of the parties through their counsel; this constituting the evidence in the matter and the evidence being uncontradicted and to the effect

that Faith Christian School still remains open and that uncertified teachers and administrators are teaching secular subjects in violation of the orders of this Court.

The Court thereupon finds that Faith Baptist Church and Reverend Everett Sileven are in contempt of the orders of this Court and that sanctions should be imposed. The Court believes that the desired end would best be reached without the imposition of a fine or incarceration of the defendant, and as a means of enforcing its judgment directs the Sheriff of Cass County to procure and install additional locks on each of the entrances to the church and school, it being one building, and to keep the building secured. The building is to be unlocked Saturday and Sunday and such other times as the building shall be used for the holding of church services.

For these purposes, the sheriff is authorized to purchase the necessary equipment and to hire a craftsman, the charges to be paid by Cass County, Nebraska, and to be taxed as costs in this case against the defendants and each of them.

The sheriff is further authorized to designate authority to his deputies or others for the patrolling and or opening and closing of the building for the purposes indicated.

IT IS THEREFORE ORDERED, ADJUDGED AND CONSIDERED by the Court that the defendants, Reverend Everett Sileven and Faith Baptist Church, are in contempt of the orders of this Court and that the Sheriff of Cass County shall forthwith secure the building by the placing of locks on each of the entrances to the church; the building to be opened on Saturday, Sunday and Wednesday evenings for the singular purpose of religious services.

IT IS FURTHER ORDERED, ADJUDGED AND CONSIDERED by the Court that a certified copy of this Order be forwarded to the Sheriff of Cass County, Nebraska, as authority to carry out the mandates of this Court.

Dated this 11th day of September, 1981.

BY THE COURT:

/s/ Raymond J. Case
District Judge

Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-897

In The
# Supreme Court of the United States
October Term, 1984

FRED TESCH, et al.,

*Petitioners,*

v.

ROBERT E. McCURRY, et al.,

*Respondents.*

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## EXCUSE MY BROKEN ARM

Very shortly after being served with a copy of the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari, the writer of this brief was in an accident which resulted in one of his arms being broken in five places. He has just returned to work. Hence, this reply brief has not been filed as early as it would have been filed had this writer not suffered a broken arm.

1. Respondents erroneously assert that their § 1983 claim for damages "obviously satisfies" the Article III actual case or controversy requirement for declaratory and injunctive relief. As this court held in *City of Los Angeles v. Lyons,* — U.S. —, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), a § 1983 claim for damages does not supply the standing necessary for a plaintiff to obtain injunctive and declaratory relief in a federal court.

It should also be observed that Respondents concede at pages 13 and 14 of their Brief that the padlocking of the building occurred only by reason of the issuance of the state court order to close the school. They do not and cannot assert that any padlocking order has been issued since the state district court ordered the padlock removed on October 20, 1982. Moreover, there is nothing in the record to support the allegations regarding the likelihood of future incidents, and no findings regarding such a likelihood were made by the Court of Appeals in support of its declaratory judgment.

Although Respondents feign surprise at the contention that the actual case or controversy prerequisite has not been satisfied, the record clearly reflects that each

Petitioner moved for dismissal of Respondents' complaint on the basis of a lack of jurisdiction over the subject matter (D.R. 26-27 and 73-86).

2. Respondents would have the Court apply the canons of statutory construction to court orders when determining the immunity of law enforcement officers who execute the same. The authorities cited by Respondents for this proposition at page 7 of their Brief are inapposite to the construction of court orders. This contention also begs the question of the meaning of immunity. If a law enforcement officer is, in fact, immune for his actions in implementing a facially valid court order, the rules of construction pertaining to the substantive content of the order are simply not relevant.

The problems inherent in using the rules of statutory construction suggested by Respondents serve to underscore the need for immunity in this context. Requiring the law enforcement officer to apply the canons of construction to each judicial order delivered for execution effectively makes such officer a review authority of every judicial order. Constitutional issues presumably reviewed and determined by the court and embodied in its decision would become subject to scrutiny by the law enforcement officer who can stymie the court's orders by refusing to execute those the officer deems unconstitutional. Who will know the basis for the law enforcement officer's construction of an order and determination of its validity or invalidity, for such determination would presumably be made extra-judicially without the benefit of pleadings, and evidence or the arguments and briefs of counsel?

In our Petition for a Writ of Certiorari, we have discussed the dilemma of the law enforcement officer if not provided with absolute immunity. If the officer in good faith executes an order valid on its face and proper in form, he or she will nonetheless be held answerable in damages under the Eighth Circuit's opinion if the action directed by the court order is subsequently held unconstitutional. On the other hand, if the officer refuses to execute an order valid on its face because the officer believes it to be unconstitutional, the officer risks being held in contempt of court with the attendant civil and criminal sanctions as well as possibly being removed from office. In this situation the officer given a judicial order to execute can only guess, risking criminal and civil sanctions, and hope that the appellate court ultimately sustains his or her position.

Respondents' suggestion that the officer should apply the canons of statutory construction to the judicial order does not resolve this dilemma. First, law enforcement officers should not be placed in the position of having to construe or interpret a judicial order that is clear on its face although possibly raising constitutional questions. Second, requiring the law enforcement officer to interpret the order and implement it in whole or in part in accordance with his or her determination of constitutionality fails to remove the risk of being held in contempt of court and subject to the same criminal and civil sanctions applicable if the officer had entirely refused to implement the order. Judges will likely treat a refusal to execute their orders, whether qualified or unqualified, as a contempt of court.

Contrary to Respondents' position, law enforcement officers should not "rewrite" judicial orders or selectively

enforce the portions of orders they deem to be constitutional. It is fundamental that determinations of constitutionality should be made in the courtroom, not in the sheriff's office.

3. Respondents erroneously assert at page 16 of their Brief that the "fact of the raid . . . [and] the identity and acts of the parties are conceded by both sides." The only aspect of these contentions supported by the record is found in the affidavit of Petitioner Tesch stating that "according to the command [of the state district court order] . . ., on the morning of October 18, 1982, I cleared the church of its occupants, and padlocked the doors securing the building." (Pet. for Cert., App A, 5a; D.R. 66).

There is nothing in the record of this case to support the allegations that *any* of the Petitioners were occupants of the building cleared and padlocked by Sheriff Tesch on October 18, 1982, pursuant to the state district court's order, or that any Respondent conducted a "raid." Thus, there is no support in the record for the declaratory judgment which the Eighth Circuit Court of Appeals directed to be entered in favor of Respondents.

## CONCLUSION

The opinion of the Eighth Circuit Court of Appeals in this action represents a radical departure from prior rulings of other circuits and of this Court regarding the principles of absolute immunity and standing as they apply to claims of constitutional deprivation by law enforcement officers and others who implement or execute court

orders. A Writ of Certiorari should issue to review these questions which will have a very significant impact on the future course of judicial administration at both the state and federal level.

Respectfully submitted,

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